Supreme Court, U.S.
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No. 09-637

IN THE

Supreme Court of the United States

SCHOOL BOARD OF BEAUREGARD PARISH,
PETITIONER

v

HONEYWELL INTERNATIONAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court below created an irreconcilable conflict between Federal and State law encouraging forum shopping when it failed to follow well-established Louisiana jurisprudence by *sua sponte* ruling that Petitioner was not entitled to bring a claim under Louisiana's Unfair Trade Practices Act, a consumer-protection statute, thereby nullifying this remedy under Louisiana jurisprudence and gutting this State consumer protection statute?

II. Whether the court below erred when it: (1) refused to consider Petitioner's *Daubert* opposition brief (which exceeded the 25-page local rule); then (2) struck Petitioner's expert based solely on Respondent's *Daubert* brief (which also violated the 25-page local rule and included only incomplete, selectively-truncated exhibits); and soon thereafter (3) granted summary judgment to Respondent because Petitioner no longer had an expert to prove its damages?

III. Whether the court below erred when it denied Petitioner's motion to amend and supplement its complaint filed *ten* months before trial, which added facts supporting its original complaint and alleged new claims that arose *after* Petitioner filed its original complaint?

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The opinion of the United States Court of Appeals for the Fifth Circuit is not reported, but can be found at 328 Fed.Appx. 973, 2009 WL 2145185, 2009 U.S. App. LEXIS 15907 (5th Cir. 2009), and is included in the attached Appendix (App. 1a) The final summary judgment opinion, that closed the case, issued from the United States District Court for the Western District of Louisiana is not reported, but can be found at 2008 U.S. Dist. LEXIS 44056 (W.D. La , May 28, 2008), and is included in the attached Appendix (App. 3a)

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the district court, was entered on July 20, 2009 (App. 1a). A timely filed petition for rehearing en banc was denied on August 17, 2009. The Order denying the Petition for Rehearing is unreported, but is included in the attached Appendix (App. 69a). This Court has jurisdiction pursuant to 28 U S.C. § 1254(1), and this petition is timely filed pursuant to 28 U.S.C. § 2101(c).

RELEVANT PROVISIONS INVOLVED

Federal Rules of Civil Procedure

> Fed. R. Civ. P 6 – Computing and Extending Time, Time for Motion Papers
>
> (a) Computing Time. The following rules apply in computing any time period specified in these

rules or in local rule, court order, or statute.

(1) *Day of the Event Excluded.* Exclude the day of the act, event, or default that begins the period.

(3) *Last Day* Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or – if the act to be done is filing a paper in court – a day on which weather or other conditions makes the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

Fed R Civ P 15 – Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(2) *Other Amendments* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires

(d) On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original

pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed R. Civ P 56 – Summary Judgment

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposition affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that the movant is entitled to judgment as a matter of law

(f) When Affidavits Are Unavailable If a party opposing the motions shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may.

(1) deny the motion;
(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
(3) issue any other just order.

Local Rules of the Federal District Court for the Western District of Louisiana

LR 5.7.11W – Technical Failures

> A User whose electronic filing is made impossible as the result of a technical failure in the Court's Web Site may seek appropriate relief

LR 7.8W – Briefs

> Except with permission of the judge, no brief shall exceed 25 pages in length, exclusive of pages containing a table of authorities or a table of contents, and no reply brief shall exceed 10 pages. Any brief exceeding 10 pages shall contain (1) a table of contents with page references and (2) a table of cases (arranged alphabetically), statutes and other authorities cited, with references to the pages of brief where they are cited

Louisiana State Statutes

Louisiana's Unfair Trade Practice Act (LUTPA)

La. R.S. 51:1409(A)

> Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by

R.S 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method act or practice was knowingly used, after being put on notice by the director or attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney's fees and costs. Upon a finding by the court that an action under this section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney's fees and costs.

STATEMENT

Beauregard Parish School Board ("Petitioner") is a rural Louisiana school system with a limited tax base. In 1996, in an effort to control its energy costs (and update much of its lighting and air-conditioning equipment), Petitioner entered into a ten-year "comprehensive energy management" contract with Honeywell International, Inc. ("Respondent"). Respondent drafted the contract in which it guaranteed that Petitioner would save at least $91,932 every year of the ten-year contract. Among other requirements, the contract required Respondent to replace existing equipment (lighting, air-conditioning and automated control-systems) with more energy-efficient equipment, and Respondent itself specified the type of equipment it would install and the savings each system would achieve.

Respondent's documents obtained through discovery show that it and its subcontractors failed to install some of the energy-saving equipment entirely, and for the equipment they did install, much of it did not comply with the contract and some equipment actually used more electricity than the old equipment it replaced. The Respondent-drafted contract also required it to maintain and replace equipment for the entire ten-years of the contract, and its documents and internal correspondence show that it failed to do so which led to increased energy usage and premature equipment failures that were never fully rectified pursuant to Respondent's own contract terms.

A year after Respondent's installations, it generated an internal energy-audit report which compared Petitioner's old energy bills with the newer bills. This report showed that the energy use *increased* immediately after Respondent's installation, when it should have decreased by at least $91,932 per year according to Respondent's contract and its guarantee. Respondent never told Petitioner about this report, and internal correspondence of Respondent shows that it used the report to blame its own subcontractors for the increase in energy usage.

However, throughout the contract, Respondent never addressed these deficiencies and consistently represented to Petitioner that it had installed the correct equipment, that it was meeting the guarantee, and any increases in the bills were due to other factors – when Respondent's documents confirm that Respondent knew the increase was its own fault In fact, Respondent's own expert report admitted that it

did not achieve the guarantee in every contract year and it even specified an exact dollar shortfall for each of those years, though these numbers were much less than those computed by Petitioner's expert.

In the eighth year of the contract, Petitioner filed suit against Respondent in Louisiana District Court alleging several state-law causes of action, including breach-of-contract, bad faith and violations of Louisiana's Unfair Trade Practices Act (LUTPA), a consumer protection statute. La R.S. 51:1409(A). Respondent removed the case to Federal court relying on diversity of citizenship.

A. The District Court *Sua Sponte* Struck Petitioner's LUTPA Claim With Reasoning That Was Not Briefed or Argued By Either Party, A Rationale Which Directly Conflicted With Well-Established Louisiana Jurisprudence

Respondent filed a motion for partial summary judgment challenging Petitioner's LUTPA claim; it presented a fact-based argument that Petitioner's LUTPA claim had somehow prescribed even before the contract had ended. La. R.S. 51.1509(A). Petitioner's response brief addressed the prescription issue argued by Respondent However, instead of addressing the fact-based prescription issue briefed by the parties, the district court *sua sponte* struck Petitioner's LUTPA claim ruling as a *matter of law* that a consumer cannot maintain a LUTPA claim if it has a valid breach-of-contract claim; and since Petitioner had a viable breach-of-contract claim, as a *matter of law*, Petitioner could

not maintain its LUTPA claim (App. 57a-58a) This *sua sponte* reasoning conflicts with all Louisiana jurisprudence as well as the main reason the legislature enacted the statute, i e., to protect Louisiana consumers when a supplier/seller breaches its contract in bad faith.

In its appeal to the Fifth Circuit, Petitioner was joined by the State of Louisiana (through its Attorney General) and the Acadiana Legal Services Corporation, a non-profit law firm that provides legal representation to indigent clients in Louisiana. Both amici argued that the district court's decision conflicts with existing all Louisiana State jurisprudence (including a recent Louisiana Supreme Court opinion), would encourage forum shopping and would eliminate one of the most important statutes enacted by the State Legislature to protect Louisiana consumers

B. Ten Months Before Trial, While Respondent Was Still Producing Documents and Witnesses for Deposition, Petitioner Filed a Motion to Supplement and Amend its Complaint Which The District Court Denied With A One-Sentence Opinion

Petitioner filed its initial complaint in the eighth year of the ten-year contract. A year after the contract ended and ten months before trial (while Respondent was still producing documents and witnesses for deposition), Petitioner filed a motion under Fed. R. Civ P 15 to supplement and amend its complaint to include damages that arose in the last two years of the contract and to allege facts learned in discovery that supported its original breach-of-contract, bad faith and LUTPA

claims. It also added facts related to the Louisiana Attorney General putting Respondent on notice of its potential violation of LUTPA for its non-performance on this specific contract, as well as facts learned in discovery about Respondent's knowing bad faith La. R. S. 51 1409(A)

During discovery, both parties assumed that the district judge would allow these emergent claims to be added into this lawsuit as both parties' expert reports addressed damages in all ten years of the contract and deponents on both sides were asked questions about claims and damages that arose in the final two years of the contract. Nevertheless, the district court denied Petitioner's entire motion with a *one-sentence* decision that addressed only its supplemental LUTPA claim, failing to address any of Petitioner's amendments to existing claims or the other supplemental claims that arose after the original complaint was filed. (App. 51a)

C. The District Court Refused to Consider Petitioner's Opposition to Respondent's *Daubert* Motion (Both Parties' Briefs Exceeded The 25-Page Local Rule) and Struck Petitioner's Expert Based Solely on Respondent's *Daubert* Brief and its Incomplete, Selectively-Truncated Exhibits; The District Court Later Granted Summary Judgment to Respondent Stating That Without an Expert, Petitioner Could Not Prove Its Damages

Eighteen weeks before trial, and fourteen weeks before the *Daubert* motion deadline, Respondent filed

a *Daubert* challenge to Petitioner's expert, and the district court *sua sponte* set the motion for hearing with witnesses. Respondent's brief exceeded the 25-page local rule, but it failed to file the required motion for page extension, in violation of LR 7.8W. Petitioner's opposition also exceeded the 25-page local rule, but Petitioner filed a motion for page-extension.

The day after Petitioner filed its *Daubert* opposition brief, Respondent filed an opposition to Petitioner's motion for page extension. However, Respondent failed to identify any prejudice by Petitioner's "overlength" opposition brief. Petitioner also argued that Petitioner's Opposition was late, but the District Court's March 19, 2008 Opinion confirms that Respondent filed its *Daubert* motion piecemeal over two days – Thursday and Friday February 7-8, 2008, making Petitioner's Opposition due on Monday, February 25, 2008 (according to Fed. R. Civ. 6(a)(3) which states that if a response date falls on a weekend, the due date is moved to the following Monday) (App. 40a-41a). Even if timeliness was an issue, Petitioner filed its entire brief and all its exhibits before noon on Monday, February 25, 2008.

Three days later, before Petitioner could file a reply brief, the district court faxed an order denying Petitioner's motion for page extension, canceling the hearing, and stating that it would decide Respondent's *Daubert* motion *based solely on Respondent's brief and exhibits*. (App. 50a). In its motion for rehearing, Petitioner noted that since there would be a hearing with witness testimony, Respondent would not be prejudiced by Petitioner's opposition, inasmuch as

Respondent would have an opportunity to address it at the hearing and in its reply brief. Petitioner also noted that the trial was still several months away.

The next business day, Petitioner filed a 25-page opposition brief, a motion for the court to accept this 25-page brief and a motion for rehearing of its denial to consider Petitioner's original opposition brief (addressing errors of fact and law in the district court's opinion and Respondent's failure to show how it was prejudiced by the "overlength" brief). Petitioner's second (25-page) opposition was filed fifteen weeks before trial and eleven weeks before the *Daubert* motion deadline, so the later-filed brief did not effect any trial deadlines. In fact, on Respondent's later motion, the district court *extended* the *Daubert* motion deadline. (App. 21a)

Respondent's *Daubert* motion included only selected portions of Petitioner's expert report and deposition transcript, as well as selected portions of the scientific journals Respondent alleged were violated by Petitioner's expert Both of Petitioner's opposition briefs (that were *not* considered by the district judge) included the other relevant portions of the expert report, the deposition transcript and the scientific journals that showed that Petitioner's expert did in fact adhere to all scientific and engineering standards in performing his expert analysis as required by *Daubert v Merrell Dow Pharmaceuticals, Inc* , 509 U.S. 579, 113 S Ct. 2786, 125 L.Ed 2d 469 (1993), and *Kumho Tire Co v Carmichael*, 526 U S 137, 119 S Ct. 1167, 143 L.Ed.2d 238 (1999).

Nevertheless, the district court denied Petitioner's motions to accept its *Daubert* opposition briefs and struck Petitioner's expert based solely on the allegations in Respondent's brief (App. 24a) The district court ruled that Petitioner's expert was not qualified to render an expert opinion on the issues in this case, even though Respondent's own truncated exhibits show that Petitioner's expert has two decades of experience with dozens of Louisiana school systems, both hands-on and in design, involving the very same energy-management contracts and issues in this case, and that he followed all scientific, engineering and technical standards in his analysis. Remarkably, on two previous occasions in this case, the district court *accepted* affidavits from this very same expert. [Petitioner's expert is probably the foremost expert on energy-management contracts for Louisiana school systems. He is a Registered Professional Engineer in numerous states and has been the "professional in charge" on dozens of similar type projects, including several multi-million dollar, high profile projects] However, without Petitioner's opposition brief, the non-technical court was unable to properly interpret the industry terms-of-art and acronyms in Respondent's exhibits, and the court made numerous errors of fact that formed the basis of its decision to strike Petitioner's expert.

It should be noted that in its earlier ruling, the district court stated that it was not sanctioning Petitioner by refusing to consider either one of its *Daubert* opposition briefs but that it was merely exercising its discretion to control its docket (App. 43a-44a)

D. Despite Petitioner's Pending Motion to Compel Documents and to Reopen Depositions, the District Court Granted Respondent's Motion for Summary Judgment Essentially Ruling That Without an Expert, Petitioner Would Be Unable to Prove Its Damages

Several months before trial, Petitioner filed a motion to compel discovery due to Respondent's non-production of more than 5000 pages of documents and requested that it be allowed to retake depositions after the new documents were produced. Petitioner's motion meticulously described these non-produced documents that were either discussed in documents previously produced by Respondent and its subcontractors or by Respondent's employees in their depositions. These non-produced documents included emails and other internal correspondence that would likely include admissions of Respondent's non-performance. Petitioner provided an affidavit with its motion stating how the documents were needed to refute Respondent's defenses – the very defenses that were later raised by Respondent in its motion for summary judgment.

Both parties fully briefed Petitioner's motion to compel, and the parties were awaiting a decision by the court (on the briefs) when Respondent filed its motion for summary judgment arguing that without an expert, Petitioner could not prove its damages. Petitioner opposed the motion, arguing that even without an expert, internal documents of Respondent admitted both liability and exact dollar-damages for many of

Petitioner's claims

Specifically, Respondent's own expert admitted in his report that Respondent had not met the guarantee in every year of the contract, and he gave the exact dollar amount of the shortfall in each of those years. Respondent's employees admitted that they had not installed much of the energy-saving equipment enumerated in the Respondent-drafted contract that also specified the annual dollar savings each piece of equipment would save over the entire ten years of the contract. Petitioner argued that these documents and admissions would be enough for a jury to determine damages without an expert. Additionally, Respondent's motion for summary judgment was *not* supported by affidavits, while Petitioner's opposition was supported by deposition testimony and admissions in Respondent's own documents, and Petitioner also reminded the district court of its pending motion to compel.

Nevertheless, the district court granted summary judgment to Respondent and dismissed Petitioner's complaint, never addressing Petitioner's pending motion to compel

Petitioner appealed the district court's decision to the Fifth Circuit Court of Appeals and was supported with amicus briefs from both the State of Louisiana and the Acadiana Legal Services Corporation, a non-profit law firm providing legal assistance to those who cannot afford legal representation.

On July 20, 2009, the Court of Appeals issued a four-sentence opinion affirming the district court for the reasons given by the district court in its various decisions (App. 1a) On August 17, 2009, the Court of Appeals denied Petitioner's motion for rehearing and rehearing en banc. (App. 69a) Since the Court of Appeals decision adopted the reasons and rulings issued by the district court, this petition addresses the reasons given by the district court.

REASONS FOR GRANTING THE PETITION

A. The District Court's *Sua Sponte* Reasoning in Striking Petitioner's LUTPA Claim Creates an Irreconcilable Conflict Between State and Federal Law That Will Encourage Forum Shopping and Nullify Well Established Louisiana Jurisprudence Under the State's Most Important Consumer Protection Statute, Thereby Cancelling This Remedy Under Louisiana Law

This Court has an interest in assuring that lower courts do not create irreconcilable conflicts between Federal Courts and State Courts in their interpretation of state statutes so as to prevent/minimize forum shopping. The district court's decision here, affirmed by the Fifth Circuit, clearly creates a forum-shopping situation with regards to this important consumer-protection statute – so much so that it elicited two amicus briefs in the Fifth Circuit, one from the State of Louisiana and one from a non-profit, legal services corporation that represents indigent clients in consumer transactions.

It should be noted that Petitioner filed its complaint in Louisiana State District Court and Respondent removed the case to Federal Court. If the case had not been removed from State court to Federal Court, Petitioner would not have lost its right to bring a LUTPA claim in this lawsuit. *See, Erie R Co. v Tompkins*, 304 U.S 64, 58 S.Ct. 817 (1938).

"Under *Erie*, when a federal district court exercises diversity, pendent or supplemental jurisdiction over State law claims, 'the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.'" *Felder v Casey*, 487 U S 131, 151, 108 S Ct. 2302 (1988), *quoting, Guaranty Trust Co v. York*, 326 U.S 99, 109, 65 S Ct. 1464 (1945). Avoiding judge-made rules in federal court, which undercut a litigant's rights which he otherwise would enjoy under state law, promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the state courts on the substantive rights of its citizens are in most cases expressions of their sovereignty.

LUTPA was enacted primarily to protect consumers from unethical business practices by sellers. In its *sua sponte* reasoning, affirmed by the Fifth Circuit, the district court ruled that as a *matter of law*, if a consumer has a breach-of-contract claim, then it cannot also maintain a claim under LUTPA. As noted by both amici in their briefs to the Fifth Circuit, the very nature of the consumer-seller legal relationship implies that a mistreated consumer will automatically have a breach-of-contract claim, and when the seller's

behavior violates the heightened ethical standards required by LUTPA, the Louisiana legislature wanted to give consumers the right to pursue an additional cause-of-action to recover additional damages.

As noted by both amici, the district court opinion directly conflicts with well-established Louisiana jurisprudence that allows all types of consumers to bring both a breach-of-contract claim and an additional cause-of-action under LUTPA when the seller's breach is particularly egregious. *E g , Miller v. Conagra*, 991 So.2d 445, 455 (La. 2008)(this heightened ethical determination is a question of fact for the jury)

Given this district court decision, as affirmed by the Fifth Circuit, defendant-sellers will undoubtedly attempt to remove to the Federal courts all LUTPA claims filed in state court seeking LUTPA damages. Even when the breach-of-contract damages alone do not meet the dollar-threshold for Federal court jurisdiction, since LUTPA allows for additional damages, it will not be difficult for out-of-state defendants to allege the jurisdictional threshold for removal

B. The District Court Erred When It Allowed Respondent to File A *Daubert Motion* Brief That Exceeded The 25-Page Local-Rule Limitation But Refused to Consider Petitioner's Opposition Brief That Also Violated the Same Local Rule; And Then, Using Only Respondent's Brief and Its Selectively-Truncated Exhibits, Struck Petitioner's Expert and Entered Summary Judgment for Respondent By Ruling That Without An Expert, Petitioner Could Not Prove Its Damages

A basic principle of American jurisprudence is that the courts will apply their rules consistently to all parties This Court has not spoken recently about the need for district courts to apply their local rules consistently and fairly, but this is a necessary maxim to promote public-confidence in our Federal legal system. *Foman v. Davis*, 371 U S. 178, 181, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)(It is "contrary to the spirit of the Federal Rules of Civil Procedure for decisions *on the merits* to be avoided on the basis of such mere technicalities.") *Conley v Gibson*, 78 S.Ct. 99, 103, 355 U.S. 41, 48, 2 L Ed.2d 90 (1957)("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision *on the merits.*")(emphasis added).

The district court's application of its 25-page local-rule limitation to Petitioner to bar its submission but *not* bar Respondent's 27-page brief, in the very same motion, violates the fundamental principle that

the courts will apply their rules fairly, equitably and uniformly to all parties in a lawsuit.

1. For Daubert Motions, Lower Courts Need More Guidance Regarding the Minimum Effort Required to Satisfy Their "Gatekeeper" Responsibilities, When Local Rules May Justify Striking a Party's Opposition Entirely, and What Is the Initial Burden-of-Proof Required for a *Daubert Motion*

While this Court has provided some guidance to lower courts regarding their "gatekeeper" responsibilities in analyzing a *Daubert* opposition, this Court has provided little guidance as to when a district court is justified in refusing to consider a *Daubert* opposition brief entirely. Most circuit courts have held that it is reversible error for a district court to deny a party the opportunity to provide expert testimony to support its claims – even when local rules were violated, the trial has to be continued and the opposing party was the sole reason for the continuance *See, Betzel v. State Farm Lloyds*, 480 F.3d 704, 707-709 (5th Cir. 2007)(It was an abuse of discretion for the district court to sanction the insured for naming his expert late by prohibiting the expert's testimony, when the insured could not otherwise prove its damages and any prejudice could have been cured with a continuance – the court's preferred means for dealing with a late-named expert.) (Here, a continuance would not have been required, since Petitioner filed its original opposition timely and its 25-page opposition brief one week later – *fifteen weeks* before trial)

Foman v Davis, and *Conley v. Gibson* hold that strict adherence to the dictates of local rules (which are designed to help get cases to a trial *on the merits*) sometimes must yield to the interests of justice in order to avoid a harsh "sanction" of preventing a party from presenting its case *on the merits*. Further, when a party is denied an opportunity to submit an opposition because of a nominal violation of court rules, it has been denied constitutional due process. *See, Societe Internationale Pour Participations Industrielles et Commerciales, S A. v Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087 (1958)("[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case ")

Here the district court stated that it was not sanctioning Petitioner by refusing to consider its *Daubert* opposition briefs, but that it was merely exercising its discretion to control its docket. (App. 43a-44a) However, there was no stress being put on the docket since Petitioner's initial opposition was filed *12 weeks* before the *Daubert* motion deadline and *16 weeks* before trial; and Petitioner's 25-Page *Daubert* Opposition was filed *11 weeks* before the *Daubert* motion deadline and *15 weeks* before trial. Furthermore, on Respondent's motion, the district court later even extended the *Daubert* motion deadline. (App 21a-22a)

In its March 19, 2008 opinion, the district court noted that Respondent never alleged it was prejudiced by Petitioner's opposition briefs (either its length or

timeliness), but ruled that prejudice was not required if Petitioner violated a local rule (App. 43a) However, prejudice to an opposing party is a primary factor for district courts to consider when allowing or disallowing late-filed oppositions. *Betzel v State Farm Lloyds*, 480 F.3d 704, 707-709 (5th Cir 2007).

According to the district court's own local rules, it should not have even considered Respondent's *Daubert* brief since it exceeded the 25-page local-rule limitation requiring a motion for leave of court. (LR 7 8W) Respondent failed to file the required motion for leave, and the district court never *sua sponte* granted leave to Respondent In its March 19, 2008 opinion, the district court stated that "when parties depart from deadlines, they *must* file for leave of court." (App.44a) The same reasoning should apply when a party, like Respondent, files a memorandum that exceeds the page limitations of the district court's own local rules but fails a motion for leave of court

On the merits, the district court should have denied Respondent's *Daubert* motion since Respondent failed to present a complete record for adjudication – Respondent's exhibits included only selected portions of Petitioner's expert report, an incomplete deposition transcript and very selected portions of the scientific journals which Respondent alleged were violated by Petitioner's expert *Jahn v Equine Services*, 233 F 3d 382, 393 (6th Cir. 2000)("[A] district court should not make a *Daubert* determination when the record is not adequate to the task.") Both of Petitioner's opposition briefs – which the district judge refused to consider – included the other relevant portions of these documents

which demonstrated that Petitioner's expert did, in fact, adhere to all scientific and engineering standards in performing his expert analysis in this case

Respondent failed to meet its burden incident to its *Daubert* motion, because it submitted an incomplete record to the district court. At a minimum, without an opposition, a *Daubert* proponent should be required to submit Petitioner's entire expert report, the entire deposition transcript of that expert and all relevant portions of the scientific journals it cites (rather than just the piecemeal pages that promote its argument) especially when the *Daubert* decision will lead to summary judgment against the opposition. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir 1987)("A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified.") Recall that here, Petitioner did not refuse to submit an opposition – *it submitted two* The only reason it was denied an opportunity to be heard was because of the district court's selective application of the local rules.

2. Especially in Daubert Motions, Where a Non-Technical Court Must Attempt to Understand Sciences and Engineering (with its Technical Terms-of-Art and Acronyms) That It is Not Familiar With, Opposition Briefs Are a Necessity to Prevent Factual Errors

Opposition briefs, hearings and cross-examination help courts to assure reliability of the

evidence presented and to avoid critical factual misinterpretations underlying their legal determinations and decisions. Oppositions are especially critical in *Daubert* motions where the district court is required to deal with unfamiliar scientific terms and technologies that can easily be misunderstood without opposition briefs and exhibits

As noted in Justice Scalia's concurring opinion in *Kumho Tire Co , Ltd v. Carmichael*, 526 U.S. 137, 158-59, 119 S.Ct. 1167, 1179, 143 L Ed 2d 238 (1999), while a district court has discretion "in choosing the manner of testing expert reliability" (its gatekeeper function), it "is not discretion to perform the function inadequately." Soon after Respondent filed its *Daubert* motion, the district court issued a briefing schedule and *sua sponte* set the motion for hearing with oral argument and witness testimony. So evidently, the district court felt it necessary to have briefs from both parties, oral argument and witness testimony to properly perform its gatekeeper function for this particular *Daubert* motion

The district court gave no justification why two weeks later it felt it could decide this *Daubert Motion* without Petitioner's opposition brief, without oral argument, without witness testimony, without Petitioner's entire expert report and without the entire deposition transcript of this expert. In performing its gatekeeper function, the district court must use a "reasonable means" to determine whether or not the expert opinion is "fausse" or the science is "junky". *Kumho Tire Co* , 526 U.S. at 158-59, 119 S.Ct at 1179 Here, the district court failed to use a reasonable means

to perform its *Daubert* gatekeeper responsibilities.

Without Petitioner's *Daubert* opposition, this district court made many factual errors that are too numerous to fully discuss in this petition; but a few examples will show how a district court can easily make factual errors that would not have occurred if it had considered Petitioner's opposition brief and why the facts of this case make it especially appropriate for cert.

In its *Daubert* ruling, the district court did understand that the relevant engineering science at issue typically goes by the acronym "M&V", but it improperly found that Petitioner's expert did not have "M&V" experience. (App. 26a-28a) "M&V" is the acronym for "Measurement and Verification" – the engineering science involved with measuring energy use of buildings. "M&V" for school system projects often use the further detailed acronyms of "EA" (Energy Audit), "TA" (Technical Assistance Audit) and "Commissioning" – the three phases of M&V typically used for energy-analysis of schools and hospitals. Respondent's own *Daubert* exhibits show that Petitioner's expert has two decades of "EA", "TA" and "Commissioning" experience. However, without Petitioner's opposition brief, the district court was unaware of these industry acronyms and terms-of-art, which led to its determination that Petitioner's expert had no relevant "M&V" experience with schools

The footnotes in the district court's *Daubert* ruling show that its "fact-findings" were basically taken verbatim from the allegations in Respondent's brief. (App. 36a-38a) Factual errors in Respondent's brief

were copied almost verbatim in the district court's *Daubert* ruling For example in its brief, Respondent alleged that Petitioner's expert had never run the METRIX computer program, when exhibits attached to Respondent's motion show that he had personally run the program at least 25 times; the district court cited Respondent's incorrect allegation as a "fact" and relied on that "fact" in making its decision to strike Petitioner's expert (App. 27a-28a)

The district court accepted wholesale Respondent's argument that Petitioner's expert did not use an appropriate analytical methodology for analyzing this school system's energy use (App. 28a-30a) However, Respondent's exhibits contained only selectively, truncated portions of the industry journals it chose to provide; it did not provide *all* the relevant industry standards the court needed for a *competent* analysis of this expert's methodologies. Petitioner's opposition contained the other relevant portions of these journals, as well as affidavits that fully explained how Petitioner's expert did indeed follow all industry standards for a proper "M&V" analysis of this specific school system (including the specific geography, weather patterns, building configurations, building construction, schedules and peripheral uses of energy at this particular school system). However, without the entire expert report, the entire deposition transcript and *all* the relevant industry journals (to say nothing of opposition briefs, oral argument and witness testimony), the district court was unable to meet the minimum requirements of its gatekeeper responsibilities under *Daubert* and *Kumho Tire*.

In performing his analysis, the district court correctly noted that Petitioner's expert used the system-wide, whole-building M&V analysis – one of four accepted industry M&V analysis methods. (App. 28a-29a) This analysis method was also mandated by the contract. (Respondent's own expert has even written approvingly about this analytical method.) However, the district court uncritically accepted Respondent's argument that the whole-building M&V analysis was not appropriate here. (App. 28a-31a) Both of Petitioner's unaccepted oppositions contained the missing journal pages not included with Respondent's brief, and they support how the system-wide, whole-building M&V analysis used by Petitioner's expert was by far the most-accurate M&V analysis method for analyzing energy use at this particular school system.

It is not the province of the district court to strike an expert merely because it thinks another analytical method is better than the method used by the expert if that method is accepted by the applicable scientific community and applied within industry norms. Further, without all the applicable scientific journal pages, the district court was not in a position to determine whether or not Petitioner's expert adhered to the standards for using the system-wide, whole-building M&V analytical methodology *Jahn v Equine Services*, 233 F.3d 382, 393 (6th Cir 2000)("[A] district court should not make a *Daubert* determination when the record is not adequate to the task."). The district court made lay-assumptions that Petitioner's expert should have considered some technical factors and improperly considered others, when the full expert report and the industry journals show that Petitioner's

expert properly applied the requirements of the whole-building M&V analytical method to this particular school system

The district court also erred when it ruled that Petitioner's expert was prohibited from testifying about Respondent's bad faith in its performance of this contract *as a matter of law.* (App. 23a) The prohibition of expert testimony in criminal cases regarding *mens rea* does not apply to expert testimony in civil cases. *See,* FRE 702, 704(a), 704(b), 1972 Comments to FRE 704. (Proving bad faith is a requirement for recovery of LUTPA damages, as well as a separate cause-of-action under Louisiana law, and Petitioner planned to use its expert to prove Respondent's bad faith.) Given his decades of experience with these kinds of energy-services contracts with Louisiana schools, Petitioner's expert is more than qualified to testify as to whether Respondent was in bad faith in its performance of this particular contract.

Daubert opposition briefs help the court to minimize misunderstandings of the science and technical-terminology involved, but they also help to prevent the district court from making faulty assumptions about the facts or the science being applied While it is not *per se* error for a district court to not hold a *Daubert* hearing to comply with its minimum "gatekeeper" responsibilities, it may be *per se* error for the district court to refuse to consider an opposition brief when one is offered. While a district court has discretion "in choosing the manner of testing expert reliability" (its gatekeeper function), it "is not discretion to perform the function inadequately."

Kumho Tire, 526 U S. 137, 158-59, 119 S.Ct. 1167, 1179 (J. Scalia's concurring opinion).

3. Summary Judgment Is Improper When it Is Based on an Improper Striking of Expert Testimony and When There Is a Pending Motion to Compel

When the district court improperly strikes a party's expert proof and later enters summary judgment because of the lack of expert testimony, most circuits have held that this is grounds for reversing the summary judgment award. *E g , Betzel v State Farm Lloyds*, 480 F.3d 704, 709 (5th Cir. 2007); *Smith v Ford Motor Co* , 215 F.3d 713, 722 (7th Cir. 2000).

In its opposition to Respondent's motion for summary judgment, Petitioner reminded the district court of its pending motion to compel which was fully briefed and was awaiting decision *before* Respondent even filed its motion for summary judgment *Wichita Falls Office Associates v Banc One Corp* , 978 F.2d 915, 918-920 (5th Cir. 1992)(It is reversible error for a district court to enter summary judgment against a party when there is a pending motion to compel and the opposing party has put the court on notice of the pending motion – with or without an affidavit); *Clark v Capital Credit & Collection Serv* , 460 F 3d 1163, 1179 (9th Cir 2006)("[t]he district court was required to determine the merits of the Clark's pending discovery motion before ruling on the summary judgment motion.")

C. While This Court Has Provided Clear Guidance Regarding Standards to Apply Regarding Motions to Amend Under Fed. R. Civ. P. 15(a), It Has Provided Little Guidance About When A District Court Is Justified In Denying a Motion to Supplement Under Fed. R. Civ. P. 15(d); On its Face, The District Court's Refusal to Allow Petitioner to Supplement and Amend its Complaint Ten Months Before Trial (at a Time When Respondent Was Still Producing Documents and Witnesses for Deposition) Appears To Be *Per Se*, Reversible Error

Petitioner's initial complaint was filed in the eighth year of a ten-year contract and was based only on facts known to Petitioner at the time of filing. Over the next two years, Respondent produced documents pursuant to discovery requests and the contract ended – i.e., Petitioner learned new facts supporting its existing claims and new claims arose in the final two years of the contract.

Within a year after the contract ended and ten months before trial, Petitioner filed its motion to supplement and amend its complaint to update its existing pleadings with facts learned in discovery and to add the claims that arose in the last two years of the contract. At the time, Respondent was still producing documents and witnesses for deposition, but Petitioner wanted to file its motion even though Respondent had still not completed its discovery obligations Respondent opposed the filing but made no significant showing of prejudice as to why Petitioner should not be allowed to file its motion.

Fed R Civ. P 15(a) governs amendment of pleadings for events that occurred before an existing complaint was filed, and Fed. R. Civ P. 15(d) governs supplementation of the complaint to add new claims that arose after the complaint was filed. This Court has consistently held that under Rule 15(a), leave to amend a complaint should be freely granted, especially when the opposing party is still producing documents and witnesses for deposition and has not shown any prejudice by the amendment. *E.g*, *Foman v Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L Ed.2d 222 (1962)(denying leave to amend, absent articulable reason, is "not an exercise of discretion" but an "abuse of that discretion and inconsistent with the spirit of the Federal Rules."). However, this Court has given little guidance to lower courts when leave to supplement must be granted – Fed. R Civ. P. 15(d).

The district court denied Petitioner's motion to supplement and amend its complaint in its entirety with a one-sentence decision that addressed *only* Petitioner's supplemental LUTPA claim; it failed to address any of the other amending or supplemental claims. (App. 51a) After Petitioner filed its motion to supplement and amend, the district court issued its *sua sponte* ruling on Petitioner's causes of action under LUTPA. Since Petitioner's supplemental and amending complaint addressed many other claims, the district court should not have denied the motion in its entirety In addition, since Petitioner wanted to preserve for appeal its LUTPA claims that arose both before and after it filed its initial complaint, the district court should have allowed Petitioner's amending/supplemental complaint to be filed and then

entered a second summary judgment on the supplemental LUTPA claims, as suggested by Petitioner.

Many lower courts have held that a motion for leave to supplement under Rule 15(d) should be governed along the same "should be freely granted" standard governing motions to amend under Rule15(a) *E g , Quaratino v Tiffany & Co.*, 71 F.3d 58, 66 (2nd Cir. 1995)(The "should be freely granted" standard for Rule 15(a) motions cited in *Foman v Davis* should be applied to Rule 15(d) motions)

Petitioner should not have been forced to file a separate lawsuit to preserve the claims that arose in the last two years of the contract. As noted in *Alabama v U S Army Corps of Engineers*, 382 F. Supp. 2d 1301, 1330-31 (N D. Ala 2005).

> The policy of judicial efficiency that "a party should be given every opportunity to join all of his grievances against another party regardless of when they arose" underlies the current, more permissive trend. *See* Wright & Miller, *supra,* at § 1506; *see also Franks v Ross*, 313 F.3d 184, 198 (4th Cir. 2002)(noting that "[v]arious courts have concluded that requiring a plaintiff to go through the needless formality and expense of instituting a new action when events occurring after the original filing indicated he had a right to relief is inconsistent with the philosophy of the Federal rules").

Under Fed. R. Civ P. 15(d), Petitioner asserts

that the district court erred when it denied Petitioner's request to add supplemental claims because: (1) all of Petitioner's supplemental claims were directly related to the contract at issue; (2) Respondent was still producing documents and witnesses for deposition at the time of the motion; (3) both parties' experts had prepared their reports assuming ten-years of damages (i.e , that the new claims would be supplemented into the current lawsuit); (4) the trial was still ten months away; and (5) Respondent provided no significant argument showing how it would be prejudiced if Petitioner were allowed to file its Supplemental and Amending Complaint.

Here, the district court's one-sentence decision denying Petitioner's motion to supplement and amend only addressed Petitioner's supplemental LUTPA claims. It did not give a reason for denying any of Petitioner's amending claims or any of Petitioner's other supplemental claims. Without reasoning, the appellate court could not make a reasonable evaluation of the district court's decision. Under Fed R Civ. P. 15(a), this Court stated:

> [T]he grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave, without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed 2d 222 (1962).

Under any circuit court guidelines, it was an

abuse of discretion for the district court to deny Petitioner's motion to amend and supplement its complaint. The district court's one-sentence denial of Petitioner's motion, that only addressed Petitioner's supplemental LUTPA claim, failed to give reasoning to support its denial of any of the amending claims and the other (non-LUTPA) supplemental claims. Further, since Petitioner wanted to preserve its supplemental LUTPA claims for appeal, the district court should have allowed those claims to be added as well and then dismissed them via summary judgment.

CONCLUSION

For all the reasons identified herein, Petitioner requests this Court to grant this petition and issue a writ of certiorari to the Fifth Circuit Court of Appeals.

Respectfully Submitted,

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(any footnotes trail end of each document)
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30641
SCHOOL BOARD OF BEAUREGARD PARISH,
Plaintiff-Appellant,
versus
HONEYWELL INTERNATIONAL, INC.,
Defendant-Appellee.

No. 08-31004
SCHOOL BOARD OF BEAUREGARD PARISH,
Plaintiff-Appellant,
versus
HONEYWELL, INC.,
Defendant-Appellee.

July 20, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeals from the United States District Court for the Western District of Louisiana. No. 2:05-CV-1388.

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM: *

The school board sued the defendant company, asserting state law claims regarding a contract to

provide various types of equipment and services designed to save energy expenses for the school district. In several rulings explained by memorandum orders, the district court granted summary judgment for the defendant and assessed sanctions, and the school board appeals.

We have reviewed the briefs, the applicable law, and pertinent portions of the record and have heard the arguments of counsel. The rulings are free of reversible error, and the judgment is AFFIRMED, essentially for the reasons supplied by the district court.

Footnotes

*Pursuant to 5TH CIR R 47 5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR R 47.5.4

DOCKET NO. 2:05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS
HONEYWELL INC.

May 28, 2008, Decided
May 28, 2008, Filed

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY.

MEMORANDUM RULING

Before the court is defendant Honeywell, Inc 's (hereinafter "Honeywell") Motion for Summary Judgment [doc. 139]. The plaintiff, Beauregard Parish School Board (hereinafter "BPSB"), filed a Memorandum in Opposition [doc. 141]. Honeywell filed a Reply [doc. 143]. The matter is scheduled for a two-week jury trial starting on June 23, 2008.

FACTS

On April 24, 1996, BPSB and Honeywell entered into a contract (hereinafter "the contract") that required Honeywell to install new, energy-efficient light bulbs and ballasts at fifteen school campuses and office buildings in the district [1] The contract was to provide BPSB with operational savings of $ 52,833 in the first year, and $ 15,600 in years two through ten [2] The contract also required Honeywell to provide one hour of

training annually to principals, faculty, and staff at each campus on energy efficiency, lighting, and HVAC [3] Honeywell was also required to provide one hour of training annually for all school coordinators, and four hours of training annually to maintenance personnel. [4] BPSB paid Honeywell for all of Honeywell's work in November of 1996. [5]

On September 24, 2007, this Court granted partial summary judgment in favor of Honeywell, and dismissed BPSB's extracontractual claims, which included: a Louisiana Unfair Trade Practices and Consumer Protection Law claim, a misrepresentation claim, an unjust enrichment claim, a detrimental reliance claim, and a claim for new Trane chillers. [6] This Court also found that the contract's consequential damage waiver clause is enforceable. [7] This Court also found that the contract between Honeywell and BPSB is fully integrated.[8]

On March 24, 2008, this Court granted Honeywell's Motion to Exclude Expert Testimony of Lawrence W. Blanchette in its entirety [9] The Court found that Blanchette did not qualify for expert status in the field of measurement and verification (hereinafter "M&V") savings. [10] The Court further found that a utility bill analysis is an inappropriate measure of M&V savings in this case because energy savings are a small percentage of district-wide savings, especially where Blanchette failed to account for several crucial variables, such as weather and new computers, which require more air conditioning. [11] This Court also restated that pre-contractual negotiations are inadmissible because the contract is fully integrated. [12]

SUMMARY JUDGMENT STANDARD

A court should grant a motion for summary judgment when the file, including the opposing party's affidavits, demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law " FED. R. Civ. P. 56(c); *Celotex Corp v Catrett*, 477 U.S. 317, 323-24, 106 S. Ct 2548, 91 L. Ed. 2d 265 (1986). The party moving for summary judgment is initially responsible for demonstrating the reasons justifying the motion for summary judgment by identifying portions of pleadings and discovery that demonstrate the lack of a genuine issue of material fact for trial. *Tubacex, Inc v M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The court must deny the moving party's motion for summary judgment if the movant fails to meet this burden. *Id*

If the movant satisfies this burden, however, the nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Id* In evaluating motions for summary judgment, the court must view all facts in the light most favorable to the nonmoving party *Matsushita Elec Indus. Co v Zenith Radio Corp* , 475 U S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1975) There is no genuine issue for trial, and thus a grant of summary judgment is warranted, when the record as a whole "could not lead a rational finder of fact to find for the non-moving party...." *Id*

ANALYSIS

Honeywell brings its Motion for Summary Judgment to dismiss all of BPSB's remaining claims. First, Honeywell seeks summary judgment on claims BPSB raised for the first time through Blanchette's expert

report. Second, Honeywell seeks summary judgment on all of BPSB's remaining claims.

A.) Claims Raised For the First Time in Blanchette's Expert Report

Blanchette, on BPSB's behalf, raised extracontractual claims against Honeywell for annual construction advice, missed technological opportunities, First Street School analysis, and replacement lighting Honeywell argues that the parties' contract never provided for these items. Honeywell also argues that these claims are not contained within BPSB's complaint, the Rule 26(a)(1) disclosures, or interrogatories.

BPSB argues that the contract is not integrated because integration is a common-law concept that Louisiana's civil law does not recognize (citing Litvinoff, *The Law of Obligations*, Part I § 12.93). BPSB also argues that Honeywell's engineer stated that the contract could not be understood from the four corners of the document and thus the contract is not fully integrated.

If contractual terms are unambiguous, the contract may be interpreted as a matter of law, making summary judgment appropriate. *Brown v Drillers, Inc* , 93-1019 (La. 1114194); 630 So 2d 741, 750; *see also* LA. STAT. ANN. CIV CODE art 2046. When a contract is clear, the court may look no further than the four corners of the document and cannot consider parol evidence. LA. STAT. ANN. CIV. CODE art 1848. Furthermore, Louisiana law gives effect to integration clauses where the contract properly reflects the parties' intentions. *Condrey v SunTrust Bank of Georgia*, 429 F.3d 556, 564 (5th Cir. 2005) (finding under Louisiana state law

that a contract was fully integrated when it contained language that "[t]his agreement sets forth the entire agreement and understanding between the parties as to the subject matter of this agreement ..").

The contract between Honeywell and BPSB is fully integrated. [13] The contract does not require Honeywell to provide annual construction advice. [14] This contract also does not require Honeywell to affirmatively seek technological opportunities for BPSB. [15] The contract does not require Honeywell to perform any work at the First Street School. [16] Because the contract between BPSB and Honeywell is fully integrated, Honeywell is only bound to perform the terms of the contract, and thus these extracontractual claims are dismissed.

Blanchette also claims that Honeywell should remove and replace all of the lighting at a cost of $ 595,085 BPSB does not present competent summary judgment evidence that Honeywell should replace all of the lighting. BPSB cites to one page out of a catalog to show that Honeywell installed improper lighting. [17] Thus, BPSB's claim that Honeywell should provide replacement lighting at a cost of $ 595,085 is also dismissed

B.) BPSB's Remaining Claims

BPSB's remaining claims are based upon Honeywell's alleged failure to provide the energy savings promised in the contract and Honeywell's alleged breach of contract with respect to the lighting installation.

1) Energy Savings and Damage Claims

BPSB is suing for damages relating to the energy savings guarantee in the contract and other energy savings BPSB argues Honeywell should have provided.

BPSB alleges that the chiller and lighting equipment Honeywell installed did not save energy as promised over a ten-year period, and actually increased BPSB's operational costs

"Louisiana law forbids an award of damages based on speculation." *Stokes v Georgia-Pacific Corp*, 894 F.2d 764, 770 (5th Cir. 1990). Louisiana courts have granted summary judgment in contract cases where the plaintiff could not present proper proof of damages. *Infusion Res, Inc v Minimed, Inc*, 351 F 3d 688, 695-96 (5th Cir. 2003). Similarly, summary judgment is also appropriate when the plaintiff fails to raise a material issue of fact regarding causation *See Vekic v Wood Energy Corp*, 2004 U.S. Dist. LEXIS 21383, 2004 WL 23 6773 2, *3 (E.D La Oct. 20, 2004).

Honeywell argues that BPSB cannot prevail on its energy savings claim because BPSB must establish both causation and damages with reasonable certainty, which Honeywell argues is impossible without expert testimony. Honeywell argues that BPSB's sole source of expert analysis on damages was from Blanchette, who is excluded as an expert witness per the March 24, 2008 Memorandum Ruling. Honeywell argues that BPSB has no other competentgevidence on damages, and points out that this Court has held that an energy savings analysis requires an expert qualified in M&V who uses proper techniques and industry standards. Honeywell also argues that BPSB cannot prove causation, or that any increase in energy costs is attributable to Honeywell's work and not something else, which is another essential element of a contract claim. Additionally Honeywell argues that BPSB must present an expert to refute Honeywell's M&V expert, and that a utility bill analysis is inappropriate [18] Thus,

Honeywell argues, summary judgment is appropriate because BPSB cannot raise a genuine issue of fact as to either damages or causation, two essential elements of its claim.

BPSB argues that it can prove damages based on its utility bills, which can be introduced by fact witnesses. BPSB argues that the contract guarantees energy savings of $ 91,932 every year of the ten-year contract. [19] BPSB seeks to produce utility bills to show that it did not save $ 91,932 in savings each year of the contract, as measured against the three-year average, running from September 1, 1992 through August 31, 1995. [20] BPSB would introduce evidence that the average annual electricity bills for the baseline period were $ 625,182.42, and subtracting $ 91,932 from this amount would give a baseline cost of $ 533,240 42 per year BPSB argues that because the utility bills were higher than the baseline, it can satisfy its burden of proving damages.

BPSB next argues that the burden then shifts to Honeywell to make any adjustments it deems "significant" and to justify those adjustments. [21] BPSB states that the utility bills have been submitted to Honeywell and will be introduced as exhibits at trial by either the Superintendent, the BPSB's custodian of records, or BPSB's Director of Finance. [22] BPSB states that the totals for each year is "just simple addition, which does not require an expert."' [23] BPSB also claims that Honeywell does not dispute that BPSB's energy costs increased after the retrofit

Next, BPSB argues that it can use Honeywell's own expert report to demonstrate that Honeywell did not achieve the guaranteed savings in every year of the

contract. [24] BPSB argues that it has not made any significant changes that would warrant an adjustment to the contract's energy baseline. [25] Thus, BPSB argues all it must do to recover is present the utility bills to show the shortfall, and then the burden shifts to Honeywell to refute BPSB's evidence and explain why the utility bills need to be adjusted.

BPSB further argues that Honeywell admits it failed to install much of the contracted-for equipment, [26] and that Honeywell's failure to perform its contractual obligations and knowingly trying to conceal its breach is bad faith. Thus, BPSB argues that its bad faith claim should proceed because it was not waived, and bad faith is an issue of fact that is not appropriate for summary judgment.

BPSB also argues that the contract provided Honeywell's annual training and audits would save BPSB $ 19,000 for each year of the contract. [27] BPSB further argues that it is not required to present expert testimony for its damages claim because Honeywell admits it did not provide these services, and accordingly, a jury could find for BPSB on this claim.

In Reply, Honeywell argues that BPSB erroneously characterizes the contract's guarantee. The contract does not promise that BPSB's utility bills will decrease no matter what; the contract promises that the equipment Honeywell installs will save a specified amount of energy over a ten-year period. Thus, Honeywell argues that a mere increase in total utility costs, standing alone, does not prove damages.

Honeywell also argues that BPSB's arguments regarding Bradford's expert opinion are inadmissible hearsay and were not incorporated in Bradford's expert

report Honeywell notes that BPSB does not cite to Bradford's deposition testimony or expert report, but instead cites to notes that Bradford made during Blanchette's deposition that paraphrase Blanchette's now excluded testimony and is thus misleading. Finally, Honeywell argues that BPSB's contention that BPSB is entitled to $ 19,000 annual operational savings from training and auditing is fabricated, since there is no evidence that $ 19,000 in savings was to come from these services.

The plaintiff bears the burden of proof to show damages suffered as a result of breach of contract. *Napasco Intl Inc v Tymshare, Inc*, 556 F. Supp. 654, 661 (E.D. La 1983). This Court rejects BPSB's argument that BPSB only needs to present utility bills to show a shortfall between the baseline calculations and the subsequent years, and then the burden shifts to Honeywell to prove any adjustments. The contract provides that BPSB shall provide Honeywell with the utility bills on a monthly basis, including any changes to energy-operating equipment, and Honeywell would then perform calculations to assess the program's ongoing effectiveness [28] The contract places the burden on BPSB to inform Honeywell of the addition of items such as computers or vending machines, which would alter the baseline measurement. [29] Nowhere in the contract is Honeywell required to prove any adjustments. Thus, without anything providing otherwise in the contract, BPSB, as the plaintiff, has the burden of proving damages

A plaintiff cannot prove damages by speculation *Napasco*, 556 F. Supp. at 662. BPSB cannot prove damages by calling a fact witness to introduce utility bills. Damages in this case are not a matter of "just

simple addition," as BPSB argues. This Court has already held that a utility bill analysis performed by an expert is an inappropriate methodology to prove damages in this case, especially where the analysis does not account for any variables. [30] It logically follows that using a fact witness to introduce utility bills from each year without accounting for any variables is also insufficient to prove damages.

BPSB also cannot satisfy its burden of proving damages through Honeywell's expert witness, as BPSB cites to Bradford's notes that were apparently taken during Blanchette's deposition, rather than Bradford's own deposition testimony or Bradford's expert report. [31] BPSB provides no foundation for Bradford's handwritten notes, and the notes alone are insufficient. Moreover, BPSB has not presented competent summary judgment that there is a genuine issue of material fact as to its damages BPSB hired Blanchette to "analyze the performance-guarantee contract.. with Honeywell, to determine if BPSB had any damages and to quantify BPSB's damages, if any." [32] BPSB's Rule 30(b)(6) witness deferred to BPSB's expert on how to calculate energy savings, stating that "somebody that's skilled in this would know what to do-I'm not" [33] Because having a fact witness introduce utility bills is not adequate to prove damages, BPSB cannot prove an essential element of its case and summary judgment is appropriate

BPSB's claim that it does not require any evidence to recover $ 19,000 per year due to Honeywell's alleged failure to train and audit is mistaken The contract states that BPSB will receive a $ 19,000 savings that is a transfer from operational savings. [34] There is no indication this $ 19,000 is linked to a failure to train and

audit Similarly, BPSB presents no competent summary judgment evidence on the issue of bad faith BPSB alludes to "fact testimony and Honeywell's own internal emails" that show Honeywell attempted to conceal the fact that it did not install equipment it was required to install, and states that BPSB does not need an expert to prove bad faith BPSB fails to produce any of this fact testimony or internal e-mails. Because BPSB has failed to demonstrate by competent summary judgment evidence that there is a triable issue of fact as to Honeywell's bad faith or the loss of $ 19,000 per year, these claims are likewise dismissed

2) Lighting Installation

BPSB argues that the lighting retrofit was improperly performed. Honeywell argues that because BPSB accepted and paid for the lighting retrofit in 1996 that BPSB may not now argue for a new lighting retrofit. It is undisputed that BPSB paid for the lighting retrofit in full in 1996.

> [W]hen the obligor is bound to deliver a specified and individualized thing, his performance will not extinguish the obligation unless he delivers that thing... Nevertheless, the obligor may give a different thing if the obligee consents to receive it in performance of the obligation This is the case of a the giving in payment, which is actually an agreement between obligor and obligee to extinguish the Obligation through the rendering of a performance different from that originally contemplated.

5 LA. CIV. L. TREATISE § 13.12 (2006-07) (citing LA. CIV. CODE ANN, arts 2655 & 2659). [35] "The acceptance of a work without objection, protest or complaint respecting the manner of performance, estops the owner from recovery of damages resulting from defective work, However, acceptance with the understanding that certain defects will be remedied does not bar recovery for the cost of remedying such defects." *Brouillette v Consol Constr Co. of Florida, Inc.*, 422 So. 2d 176, 177 (La. Ct. App. 1982) Furthermore, an owner is barred from recovering the cost of the work if the work was accepted "despite the patent defects or imperfections discoverable upon reasonable inspection" *Larkins v Cage Contractors, Inc*, 580 So 2d 1068, 1069 (La. App. 4th Cir. 1991). Thus, whether BPSB has a claim against Honeywell depends on whether there is at least a triable issue of fact that BPSB accepted the work with the understanding that certain defects would later be remedied

Honeywell argues that BPSB is estopped from now claiming damages arising from the lighting retrofit because BPSB accepted and paid for the lighting retrofit without protest. [36] Moreover, Honeywell notes that this Court dismissed BPSB's claim for replacement Trane chillers because BPSB accepted and paid for McQuay chillers without protesting their installation in 1996, which is the same rationale Honeywell presents here [37]

BPSB argues that although it paid Honeywell in full, BPSB did not accept Honeywell's installation of the lighting retrofit. BPSB notes that Honeywell continued to install and replace ballasts after the last payment. [38] BPSB also argues that Honeywell's internal documents

required Honeywell to obtain a signed acceptance, which Honeywell never attempted to procure [39] BPSB states several instances where the lighting retrofit that was installed does not comport with the lighting for which BPSB contracted Based on these claims, BPSB argues that a jury could easily find that every single ballast Honeywell installed needs to be replaced even without expert testimony.

In Reply, Honeywell argues that BPSB cites to unidentified documents, and presents no testimony, lay or expert, about the documents or any alleged deficiencies, yet argues that a jury could find for BPSB Moreover, Honeywell notes that BPSB withheld Honeywell's final payment, due in August 1996, until November 1996, when the Board voted unanimously and without protest to release the funds to Honeywell [40] Honeywell also distinguishes BPSB's routine maintenance pursuant to the parties' service agreement from the original installation work completed in 1996, and argues that performing routine maintenance does not indicate that the original work was not accepted

Honeywell also rejects BPSB's argument that none of the Honeywell performance failures would be apparent to a layperson, such as a BPSB maintenance employee. Honeywell argues that the lighting installation was open, obvious, and observed daily by building occupants, and that BPSB had ample time in which to inspect the equipment before rendering final payment. Honeywell alternatively argues that if the non-conformities were not apparent to a layperson then BPSB would require an expert to prove its claim, which it does not have.

The contract provides that "the warranty effective date is the date of the Customer acceptance, the date the job is finaled, or the date the Customer begins to receive beneficial use of the product, whichever comes first. [41] The contract also provides that the maintenance agreement start date occurs at the acceptance of retrofit services [42] Nothing in the contract requires Honeywell to obtain written acceptance from BPSB. The contract is fully integrated, and as such, this Court will not look beyond the contract to determine the parties' obligations. Because the contract did not require Honeywell to obtain BPSB's written acceptance, there is no requirement that Honeywell do so. Accordingly, BPSB's deposition testimony is inadmissable because it seeks to impose responsibilities on Honeywell that are not in the contract.

BPSB's sole document it proffers to show that the lighting installed was not the lighting contracted for is one page from a catalog. [43] BPSB does not provide any foundation or testimonial evidence for this catalog, and the catalog, without further explanation, is insufficient to prove that the lighting installed did not conform to the contract's specifications. Thus, BPSB did not present competent summary judgment evidence that it paid for the lighting retrofit with protest or with the understanding that certain defects would be remedied There is no triable issue of fact as to whether the lighting retrofit was properly installed; accordingly,

IT IS ORDERED that Honeywell's Motion for Summary Judgment [doc. 139] is hereby GRANTED,

IT IS FURTHER ORDERED that this case is hereby DISMISSED in its entirety.

Lake Charles, Louisiana, this day of 28 day of May, 2008.

/s/ Patricia Minaldi

PATRICIA MINALDI

UNITED STATES DISTRICT JUDGE

1 Def's Ex. 6 (BPSB-Honeywell contract).

2 *Id* at 19.

3 *Id* at 26.

4 *Id* at 27-28.

5 Def.'s Ex. 10, p. 221.

6 *Id*

7 *Id.* The Court noted that the waiver was enforceable except as to damages arising out of bad faith or intentional misconduct. *Id.*

8 Mem. Ruling (Sept. 24, 2007) [doc. 95].

9 Mem. Ruling (March 24, 2008) [doc. 134].

10 *Id*

11 *Id* at 5-7.

12 *Id*

13 *See* Mem Ruling (Sept. 24, 2007) [doc. 95] Like the integration clause in *Condrey*, BPSB-Honeywell contract states:

> [t]his guarantee represents the entire agreement between Honeywell and the Client with regard to the energy and operational guarantee. This guarantee does not include any documents, materials, commitments, representations or comments that are not expressly incorporated by reference into this guarantee. The parties agree that this guarantee describes the full and complete agreement with respect to such guarantee and that there are no other agreements relating to or modifying this provision..

Def.'s Ex. 6 (BSBP-Honeywell contract)

14 Def.'s Ex. 6 (BPSB-Honeywell contract) Furthermore, Blanchette admitted that the contract does not require annual construction advice, but he felt this requirement should have been part of the contract. Def.'s Ex. 16 (Blanchette Aff pp 253-54)

15 Def.'s Ex 6 (BPSB-Honeywell contract).

16 *Id* Blanchette based this claim on his belief that negotiations surrounding the First Street School should have been incorporated in the contract. Def 's Ex 16 (Blanchette Aff, pp 214-15).

17 Pl.'s Ex. 20.

18 Bradford Aff., pp 8-22 [doc 112-9]

19 Pl.'s Ex. 1, p 32 (BPSB-Honeywell contract)

20 *Id* at 18.

21 Pl.'s Ex. 1, pp. 20, 23 (BPSB-Honeywell contract).

22 BPSB summarizes its actual costs for each year, the baseline amount, and the savings that it argues were not achieved. Pl.'s Mem. in Opposition to Def.'s Mot. for Summary Judgment, at 3. BPSB argues that the total savings not achieved is $ 1,755,641 72. *Id*

23 Pl.'s Mem. in Opposition to Def 's Mot for Summary Judgment, at 4.

24 Pl 's Ex. 3, p 4 (Jim Bradford Expert Report).

25 *See* Pl.'s Mem. in Opposition to Def.'s Mot. for Summary Judgment, at 9-11.

26 BPSB cites no evidence for this proposition

27 Pl 's Ex. 1, pp. 18, 32 (BPSB-Honeywell contract). In fact, the contract states that BPSB will save $ 19,000 as a transfer from operational savings, and makes no mention of savings from annual training and audits. *Id* at 32.

28 *Id* at 20, 24

29 *Id* at 24.

30 Mem. Ruling (March 24, 2008) [doe 134]

31 Pl.'s Ex 10.

32 Blanchette Aff. P 2 [doc 127-7].

33 Def.'s Ex 14, pp. 14-16.

34 Pl.'s Ex. 1, p. 32 (BPSB-Honeywell contract).

35 Article 2655 states, "Giving in payment is a contract whereby an obligor gives a thing to the obligee, who accepts it in payment of a debt." Article 2659 explains, "The giving in payment is governed by the rules of the contract of sale, with the differences provided for in this Chapter."

36 Def.'s Ex. 10, P. 221.

37 Mem. Ruling (Sept 24, 2007) [doc. 97].

38 Pl 's Ex. 17.

39 Pl.'s Ex. 19, pp. 62-64 (Chris Pieper Dep.)

40 Def 's Ex 10.

41 Def.'s Ex. 6.

42 *Id*

43 Pl.'s Ex 20

Filed 5/20/2008

DOCKET NO. 2:05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY.

ORDER GRANTING HONEYWELL'S EX PARTE MOTION TO EXTEND CERTAIN PRETRIAL DEADLINES

This matter came before the Court on a motion by Defendant Honeywell International Inc. for an extension of certain pretrial deadlines The Court, having considered the submissions of the parties, and being otherwise advised, enters the following order:

1. Honeywell's Ex Parte Motion to Extend Certain Pretrial Deadlines is hereby granted

2. The following deadlines in Section I of the Court's Standing Order Governing Pretrial Procedure issued in this case are hereby reset and/or extended as follows.

- Motions in limine, Daubert motions, other evidentiary motions, "may call"' witness lists, exhibit lists, and pretrial statements (excluding a

list of "'will call" witnesses) shall be filed on, or before, May 30, 2008,

• "Will call" witness lists, real time glossary, jury instructions, verdict forms, and objections to the authenticity and admissibility of exhibits shall be filed on, or before, June 9, 2008,

3. All other pretrial deadlines and the trial date in this case will remain unchanged.

Filed 3/24/2008
DOCKET NO. 2 05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY

ORDER

Before the court is a motion to Exclude Expert Testimony of Lawrence W. Blanchette, [doc 112], filed by the defendant Honeywell, Inc (hereinafter "Honeywell"), Although the plaintiff, Beauregard Parish School Board (hereinafter "BPSB"), did file an Opposition, the Motion is considered unopposed due to its untimely filing For the reasons stated in the accompanying Memorandum Ruling,

IT IS ORDERED that Honeywell's Motion to Exclude Expert Testimony of Lawrence W Blanchette, [doc 112], is hereby GRANTED, and Blanchette's expert testimony shall be excluded in its entirety.

Filed 3/24/2008
DOCKET NO. 2.05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY

MEMORANDUM RULING

Before the court is a Motion to Exclude Expert Testimony of Lawrence W. Blanchette, [doc. 112], filed by the defendant Honeywell, Inc (hereinafter "Honeywell"). Although the plaintiff. Beauregard Parish School Board (hereinafter "BPSB"), did file an Opposition, the Motion is considered unopposed due to its untimely filing.[1]

FACTS

The September 24, 2007 Memorandum Ruling thoroughly summarizes the underlying dispute between the parties.[2] On September 24, 2007, this court granted partial summary judgment in favor of Honeywell, and dismissed Beauregard's extra contractual claims, which included a claim arising under the Louisiana Unfair Trade Practices and Consumer Protection Law, a misrepresentation claim, an unjust enrichment claim, a detrimental reliance claim, and a claim for new Trane

chillers [3] This court also held that the contract's consequential damage waiver clause was enforceable [4] The parties will start a two-week bench trial on June 16, 2008.

FEDERAL RULE OF EVIDENCE 702

FED. R. EVID 702 provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1)the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

In Daubert v Merrell Dow Pharmaceuticals, Inc., 509 U.S 579 (1993), the Supreme Court tasked the federal district courts with a gatekeeper function to keep unreliable expert testimony out of evidence. 509 U S at 589 The Daubert Court articulated a non-exclusive and non-dispositive checklist for federal district courts to use when assessing the reliability of expert testimony Id. This gate-keeping function extends to all expert testimony. Kumho Tire Co. v. Carmichael, 526 U.S 137, 147 (1999) Trial judges have "considerable leeway in. determining whether particular expert testimony is reliable" Id. at 155 "Both the determination of reliability and the factors taken into account are left to the discretion of the district court consistent with its

gatekeeping function under FED R. EVID 702" Munoz v Orr, 200 F.3d 291, 301-02 (5th Cir 2000)

ANALYSIS

Honeywell argues that this court should exclude Blanchette's testimony in its entirety for five reasons. First, Honeywell argues that Blanchette's energy savings analysis is unreliable because he is not an expert, his methodology does not meet industry standards, his calculations lack a foundation, and are contrary to the laws of physics. Second, Honeywell argues that Blanchette impermissibly offers legal conclusions. Third, Honeywell argues that Blanchette cannot testify about the parties' state of mind or subjective intentions. Fourth, Honeywell argues that Blanchette's opinions about the lighting scope should be excluded because they interpret the contract and are premised on parol evidence. Fifth, Honeywell argues that there is no legal or factual basis for Blanchette's opinions about training, missing energy-saving opportunities, or a refund of service fees.

I.) Blanchette's Qualification as an Expert Witness. Blanchette's Methodology, Foundation for Blanchette's Data, and the Laws of Physics

A.) Expert Qualification

Expert status can arise from formal credentials as well as experience with a particular topic. Christopher Serv. Allied-Signal Corp , 939 F.2d 1106, 1110 (5th Cir. 1991) (en banc). At the Daubert hearing, "the only question for the trial court is whether the expert is generally qualified to render an opinion on the question in issue."

Id An expert can gain the requisite knowledge or skill from training or education, or from hands-on experience. Sullivan v Rowan Co., 952 F 2d 141, 145 (5th Cir. 1992). "A trial judge has wide discretion to admit or exclude expert testimony" Id at 144. In Sullivan, the Fifth Circuit upheld a trial court's rejection of a scientist as a metallurgical expert witness. Id. at 145. The trial court found that although the scientist, trained in microfossils and not engineering, performed over 1,000 projects involving metal failure and attended a three-day metallurgical seminar, the scientist still needed additional training or experience in the metallurgical field before the scientist could render an expert opinion. Id

Blanchette is a licensed mechanical engineer, but has not had any course work or formal training in the field of measurement and verification savings (hereinafter "M&V").[5] Blanchette had never performed an M&V analysis himself on an initial basis to reconcile energy savings on an annual basis.[6] In fact, Blanchette initially hired ABRAXAS to perform the analysis for him, using theMetrix system, because Blanchette did not know how to operate Metrix.[7] When ABRAXAS concluded that the data Blanchette provided was "of inconsistent quality," Blancherte instructed ABRAXAS to use an artificially low temperature balance point to alter the results[8] ABRAXAS did as instructed, but issued a disclaimer stating that "the balance point was inappropriate for the fit which existed between weather and utility bills," and that this second round ofsavings numbers "should be treated with far less confidence" than the first set of savings numbers[9] Furthermore, Blanchette has never published orwritten any materials on anything other than air

quality.[10] Blanchette has also never testified as an expert, in any field, prior to this litigation.[11]

Blanchette is not qualified to render expert testimony in the M&V field. He lacks formal training in M&V, and has never published or testified in the field Although experts may also gain experience through informal training, Blanchette has not done so. Blanchette has never performed an M&V analysis himself and did not know how to use the Metrix system and had to hire an outside firm to perform the analysis [12] Thus, Blanchette lacks the qualifications to testify as an expert in M&V

B.) Methodology

District courts may also consider the Daubert factors by examining the expert's methodology. Kumho, 526 U S. at 153 "This determination of reliability includes a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592.

There are three industry standards guidelines for M&V: the IPMVP, FEMP, and ASHRAE 14 guidelines.[13] Under the IPMVP, there are four possible approaches to an M&V analysis. 1.) stipulated savings, which focuses on verifying that the measures are properly installed and have the capacity to save the contracted levels of energy; 2.) measure isolation, which employs engineering calculations and site measurements to confirm the savings resulting from specific measures; 3.) whole-building evaluation, which most often performs a utility bill analysis to evaluate

savings, and 4) simulation, which uses computer energy models to compute savings as a function of the important independent variables [14]

Blanchette performed a whole-building analysis based on utility bills [15] Honeywell argues that the whole-building analysis was inappropriate because this option is not recommended when savings are a small percentage of district-wide savings.[16] Honeywell argues that any savings generated by the retrofit would be masked by the hundreds of other factors that affect energy use, such as weather, hours of operation, changes in building use or occupancy, temperature settings at the schools, changes in utility rates, and reimbursement of utility costs)[17] Honeywell notes that Blanchette simply ignored each of these factors as if no changes occurred. Blanchette states that the baseline adjustments were ten years old and undocumented, calling them "educated guess[es]."[18]

"Weather is often the most important independent variable, affecting most of the systems covered under this guideline."[19] Initially, Blanchette attempted to account for weather by employing ABRAXAS to perform the analysis, but when that analysis failed, Blanchette abandoned the weather variations in his final report.[20] Computers are also an important variable because they generate additional heat and thus require more air conditioning."[21] Although Blanchette admits that BPSB added air conditioner units for its newcomputer labs, which would increase energy consumption, he did not adjust for these variables because BPSB did not provide him with the bills he requested to perform this analysis"[22] Moreover, Honeywell argues that Blanchette failed to verify his

adjustments or compare his results against BPSB's actual utility bills, stating such a comparison is impossible because there are "100 things consuming energy in that building."[23] Blanchette further noted that the data is an "assumption" and that the baseline adjustments are all "theoretical."[24]

Thus, Honeywell argues that Blanchette's analysis does not employ proper methodology. and violates "most or all of the guidelines presented in all of the nationally recognized M&V guidelines."[25] This court agrees that Blanchette's reliance upon a utility bill analysis was the improper approach in this case, especially since he did not adjust for several crucial variables. Thus, this court finds that Blanchette departed from accepted methodology in the M&V field.

C. Foundation of Blanchette's Data and Calculations

The district court must "ensure that an expert's testimony rests upon a reliable foundation " Guillory v. Domtar Indus., Inc., 95 F.3d 1320, 1330-31 (5th Cir. 1996) In Guillory, the Fifth Circuit found that the district court properly limited Dr. Reed's testimony because it was based on "altered facts and speculation designed to bolster [the defendant's] position." Id at 1331 (quoting the district court transcript where the judge stated that Dr Reed's testimony was based on a series of speculations of what could have happened). Even though the court found Dr Reed made as accurate a measurement as he could, the court nonetheless excluded Dr. Reed's testimony because it was still based on speculation. Id The Fifth Circuit noted that "expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no

research at all. Both analyses result in pure speculation." Id.

Honeywell argues that Blanchette's opinions are speculative and should thus be excluded.[26] Blanchette concedes that his calculations are "just an exercise to come up with theoretical base line adjustments that are not true."[27] Honeywell further argues that it is undisputed that BPSB significantly increased the number of computers, labs, and related equipment during the contract period, all of which increased BPSB's energy expenditure, and makes a utility bill analysis misleading. Blanchette did make adjustments for changes in technology; however, Honeywell notes that these adjustments were based on district-wide estimates given to Blanchette by Dean Hieronymous, a BPSB employee.[28] Blanchette did not verify or test this data, nor does Blanchette know how Hieronymous computed the data.[29] Hieronymous made private handwritten notes stating, "How much is electricity costing us to run the x-tra computers that were not here when Honeywell started? We need a lower # of hours of usage!"[30] Blanchette did not consider any possible bias in Hieronymous' numbers, nor could he describe how Hieronymous obtained his field measurements [31]

This court agrees that under Daubert and Guillory, Blanchette's data is speculative and lacks foundation. Accordingly, his analysis is unreliable and is excluded

D.) Law of Physics

Honeywell also argues that Blanchette's conclusions are contrary to the law of physics because Blanchette

admits that the measurements of light fixtures retrofitted by Honeywell must have saved BPSB energy.,[32] Blanchette's calculations show that the Honeywell retrofits increased energy usage over the contract."[33] For the reasons discussed above, this court finds that Blanchette is not qualified as an expert in M&V and that his energy savings analysis is unreliable.

II.) Legal Conclusions

Expert witnesses may not offer legal conclusions. See, e.g., Estate of Sowell v. United States, 198 F.3d 169, 171-72 (5th Cir. 1999) Honeywell argues that Blanchette impermissibly offers legal conclusions throughout his expert report. Honeywell cites several occurrences where Blanchette, in his Engineering Analysis Report for BPSB, offers legal conclusions, such as: Honeywell breached its contract,[34] Honeywell acted in bad faith, [35] Honeywell acted fraudulently,[36] Honeywell was negligent and grossly negligent,[37] Honeywell breached a legal duty or standard of care,[38] and Honeywell waived its contractual rights [39] Honeywell also argues that Blanchette offers his views on the rights and obligations of the parties under their contract [40] Moreover, Blanchette admits that he offered legal opinions and stated he believes he is qualified to do so [41] Because experts are not permitted to offer legal conclusions in expert testimony, and this court finds that Blanchette impermissibly interjected several legal opinions and conclusions in his expert report, this court agrees with Honeywell that these opinions must be excluded

III) Parties' State of Mind or Subjective intentions

Courts do not permit experts to testify on the parties' state of mind or subjective intentions. Vaulting & Cash Serv , Inc v Diebold, Inc., No. Civ. A. 97-3686, 1998 WL 726070, *1 (E D La Oct 15, 1998) Honeywell argues that Blanchette repeatedly offers his opinions that Honeywell acted in bad faith or with the intent to defraud.[42] This court agrees with Honeywell that Blanchette impermissibly offered his opinions on Honeywell's subjective intentions, and thus finds these opinions inadmissable.

IV) Opinions About Lighting Scope

When the scope of a contract is clear and complete, parol evidence is inadmissable. Condrey v. Suntrust Bank of Ga , 429 F 3d 556, 563 (5th Cir, 2005) (applying LA. CIV. CODE art. 1848, which bars testimonial or other evidence to negate or vary a contract) Honeywell argues that Blanchette impermissibly relies upon pre-contractual negotiations, proposals, discussions, and other parol evidence in estimating that Honeywell should replace lighting at a cost of $595,085.[43] Honeywell argues that it had several proposed alternatives for lighting options in its negotiations with BPSB, and that BPSB selected a less costly alternative for the project Honeywell argues that Blanchette relies on some of the proposals that were not selected in computing his damages.[44] To the extent that Blanchette refers to pre-contractual negotiations, proposals, discussions, and other parol evidence in his expert report, such evidence is inadmissable.

V) Opinions About Training, Missed Energy-Saving

Opportunities, or Refund of Service Fees Blanchette claims that BPSB suffered a $1,736,500 claim for "lost training opportunities."[45] The Honeywell-BPSB contract called for approximately ten hours per year of training, which was to consist of tutorials for faculty and students and some limited equipment training for maintenance personnel.[46] The stated cost for this training was $4,777 for the ten-year contractual period.[47] Apparently, Honeywell did not perform all of the training. In Blanchette's report, he relies on marketing materials from Energy Education, Inc. (hereinafter "EEI") to extrapolate the potential energy savings.[48] Blanchette states that "school board's [sic] similar to BPSB are saving between 22-26% of their annual energy expenditure through training, education, and monitoring," and estimated the value of the program as $1,736,500 (at a 23% savings).[49]

Honeywell argues that Blanchette's expert report has no factual basis. First, Honeywell argues that EEI's marketing materials are unverified, contain little information about the schools at issue, and offer no justification for its data. Honeywell further argues that Blanchette did not investigate EEI's claims. Further, Honeywell argues that EEI's training programs are fundamentally different than those specified in Honeywell's contract; namely, the EEI programs required the school district to have ful-time on-site energy managers, undergo extensive training, purchase thousands of dollars of energy tracking software, and pay EEI monthly service fees ranging from $5,000 to $9,200, whereas Honeywell's program called for ten hours of training per year.

Second, Honeywell argues that Blanchette's opinions

about missed hypothetical technology opportunities should be excluded Blanchette states that Honeywell should be liable for $470,000 in "missed technological opportunities Honeywell argues that because nothing in the contract required Honeywell to provide this service, Blanchette's opinion is speculative. Moreover, Blanchette also states that Honeywell owes BPSB $125,000 for failing to provide annual construction advice.[51] Similarly, Honeywell argues that because this service was not in the contract, Blanchette's opinions are mere speculation.

Lastly, Blanchette speculates that Honeywell should fully refund all service fees that BPSB paid.[52] Honeywell argues that it performed preventative maintenance and repair work, which BPSB accepted and paid for. Honeywell thus argues Blanchette's opinions on service fees, missed technological opportunities, and training are biased and baseless, and should be excluded.

This court agrees that Blanchette's valuation of lost training savings is baseless. The EEI program and Honeywell's training program are fundamentally different, and thus the EEI program does not provide a good comparison This court further agrees that Blanchette's claims for missed technological opportunities is speculative Furthermore, this court finds that Blancherte does not have a factual basis for his opinion that Honeywell should refund the service fees.

CONCLUSION

IT IS ORDERED that Honeywell's Motion to Exclude

Expert Testimony of Lawrence W Blanchette is hereby GRANTED, and Blanchette's expert testimony shall be excluded in its entirety.

Footnotes

1See Mem Order (Feb. 28, 2008) [doc. 120].
2 Mem Ruling (Sept 24, 2007) [doc. 95]
3Judgment (Sept. 24, 2007) [doc. 96]
4Id.
5Def's Ex. 5, pp. 299-306.
6Id.
7Id at 98.
8Def.'s Exs. 12,14.
9Def's Ex. 14.
10Id. at 332-34.
11Id. at 331.
12 This analysis was not used for the final report. Def's Ex 5, p. 165.
13Def's Ex. 7, p. 6.
14Id. at 6-7.
15Def.'s Ex. 2, p. 19.
16 "This Option is intended for projects where savings are expected to be large enough to be discernable from the random or unexplained energy variations that are normally found at the level of the whole facility meter." Def's Ex. 8, p. 28. Moreover, this option is not used if the savings are less than 10% under the IMPYP or ASHRAE 14 models, or 20% under the FEMP guidelines. Id at 33.
17Accounting for changes is the major challenge associated with [a utility bill analysis], particularly for long-term contracts." Def.'s Ex. 9, p 20.
18Def's Ex. 5, pp. 202-03. No one on the school board knew to set aside the data so it could be addressed on

an annual basis, leading Blanchette to conclude that the baseline adjustment is a "guess" and "not reality." Id. at 206.

19Def's Ex 10, p. 10.

20Def's Ex. 3, pp. 26-28; Ex. 5, p 165; Ex. 7, p. 36.

21 Def's Ex. 7, pp 36, 4 1-42

22 Def's Ex. 5, pp. 112-14, 545-46; Ex. 13, Ex. 17.

23 Id. at 522

24Id. at 528

25 Id at 35; see also id. at 3 5-37 (listing Blanchette's departures from good M&V practices)

26 Honeywell cites to several instances of Blanchette's speculations. For example, even afterABRAXAS told Blanchette that the data was inherently unreliable and of an inconsistent quality, Blanchette did not model actual BPSB schools, but rather instructed his assistant, Aymond, to input a series of hypothetical data Def's Ex 5, pp. 392-94, 496-501, 510-20 In one instance, Aymond assumed that every window in each building was one foot square, even though Blanchette knew this was not true. Id. at 5 13-16 Furthermore, Blanchette instructed Aymond to assume that every building had an air infiltration of zero, even though he knew this was not accurate. Id. at 5 16-18. Blanchette also speculated about pre-existing usage patterns for the air conditioning units that Honeywell replaced, and used this hypothetical data in his calculations, stating "none of it is real." Id at 525-28 Blanchette further guessed about the condition and structure of the roofs Id at 69-72, 496-500. Blanchette entirely omitted printers, copiers, and vending machines from his analysis. Id at 541-43 Blanchette also did not account for changes in weekend and after-school activities, or school schedules. Id. at 552-53

Blanchette did not consider enrollment changes in individual schools, changes in student-to-teacher ratios, or changes in the number of classrooms in each school Id. at 553-56.

27 Def's Ex. 5, p. 528.

28Id at 267-70, 53 1-37.

29 Id.

30Def's Ex. 18.

31Def's Ex 5, pp. 267-68.

32 Id. at 382-85.

33Def's Ex 2, p. 19.

34Def's Ex. 2, pp. 2, 7, 14; Def's Ex. 3, pp 8, ii, 16.

35Def's Ex. 2, pp. 2, 7; Def.'s Ex. 3,pp. 14, 16

36 Def's Ex. 2, p..3, Def's Ex. 3, pp. 14-15, 20.

37Def's Ex.2,pp. 16, 19;Def 's Ex.3,pp. 8,11

38 Def's Ex 2, pp 3, 7; Def's Ex. 3, p. 23.

39Def's Ex 2,pp. 16,21,Def's Ex. 3, pp 11,25.

40Def's Ex.2,pp 5-12, 15-17;Ex 3,pp 8-11,24-26

41Def's Ex 5, pp. 127-29.

42Def's Ex 2,pp. 13, 17,Ex.3,pp. 11-16, 19,24-25.

43See Def's Ex.2,pp.9-12, 19,Ex 3,p.33;Ex.5,pp.60-65,263.

44Def's Ex. 30; Def's Ex. 6, pp 11-17)

45Def's Ex. 3, p. 33.

46 Def's Ex. 6, pp. 26-28; Ex. 7, p 29.

47Def's Ex 19.

48 Def 's Ex. 2, pp. 17-20. EEI performed energy training for three Louisiana school districts. Id.

49Def's Ex. 3,p. 33.

50Def's Exs 20-23

51In Def's Ex 2, p 19, Blanchette apparently bases this figure off of Honeywell's
proposal stating the "intrinsic value" of Honeywell's advice.

52 Def's Ex 3. p. 33.

Filed 3/19/2008

DOCKET NO. 2.05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY

ORDER

Before the court is a Motion For Reconsideration and Request for the Court to Accept a Memorandum That Complies With the Court's 25-Page Limitation, [doc 121], filed by the plaintiff, Beauregard Parish School Board (hereinafter "BPSB"). Honeywell, Inc. (hereinafter "Honeywell") filed an Opposition [doc. 124] BPSB filed a reply [doc. 129] For the reasons stated in the accompanying Memorandum Ruling, BPSB's Motion for Reconsideration is denied; accordingly,

IT IS ORDERED that the motion for Reconsideration, [doc. 121], filed by BPSB, is hereby DENIED.

Filed 3/19/2008

DOCKET NO. 2:05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY

MEMORANDUM RULING

Before the court is a Motion For Reconsideration and Request For the Court to Accept a Memorandum That Complies With the Court's 25-Page Limitation, [doc. 121], filed by the plaintiff, Beauregard Parish School Board (hereinafter "BPSB"). Honeywell, Inc (hereinafter "Honeywell") filed an Opposition [doc. 124]. BPSB filed a Reply [doc 129] BPSB requests that this Court reconsider its February 28, 2008 decision that exercised its discretion to decline consideration of BPSB's untimely Opposition to Honeywell's Motion to Exclude Expert Testimony of Lawrence W. Blanchette [doc 112]. The February 28 Memorandum Order discusses the facts underlying the dispute in this Motion [1]

Honeywell filed its Daubert Motion on February 7, and filed Exhibits 23-30 the following morning, on February 8.[2] On February 8, the Clerk's Office issued a Notice of

Motion Setting that listed Honeywell's Daubert Motion as being filed on February 7, and stated that "responses to said motion are due within fifteen calendar days after service of the motion "[3] Fifteen (15) days from February 7 was Friday, February 22. BPSB argues that Honeywell's delayed filing of some exhibits pushed back the filing date to February 8, which made the deadline Saturday, February 23 BPSB argues that pursuant to FED R. Civ. P. 6(l)(3), if the deadline for filing a brief falls on a Saturday, Sunday, or legal holiday, the deadline moves to the next business day. Thus, BPSB argues that the deadline was actually Monday, February 25

Honeywell's filing of the remainder of its exhibits the following day does not alter the submission date for BPSB's Opposition Even assuming that Honeywell's untimely filed exhibits did push back the submission date for BPSB's Opposition by one clay, the deadline would nonetheless be Saturday, February 23 Regardless of the Federal Rules and the Local Rules, the Notice of Motion Setting issued for Honeywell's Daubert Motion makes it clear that this Court counts calendar days and not business days in calculating submission deadlines.[4] Thus, the latest possible submission date was Saturday, February 23. Moreover, the fact that BPSB's counsel, Mr. Melancon, called this Court to request an extension from Friday, February 22 to Saturday, February 23 indicates that he was aware that his deadline was indeed Friday, February 22 Thus, Mr. Melancon's argument that his brief was timely filed is unavailing

As stated in the Court's February 8 Notice of Motion Setting, "[r]esponses not timely filed may not be

considered by the Court.'" Moreover, pursuant to FED R. Civ. P 6(b), judges have the discretion to grant leave to file an untimely brief Thus, this Court is well within its discretion to decline to consider BPSB's Opposition Moreover, Honeywell has submitted the deposition testimony and expert report of Mr. Blanchette, BPSB's proposed expert witness, so the Court finds that it has sufficient materials with which to decide Honeywell's Daubert Motion.

BPSB also argues that CM/ECF gave it technical problems when it tried to file on Saturday, February 23. BPSB also argues that pursuant to LR 7.7 11W, "[a] user whose electronic filing is made impossible as the result of a technical failure in the Court's Web Site may seek appropriate relief" The first indication of any attempt to file occurred on Sunday, February 24.[6] As discussed in the February 28 Memorandum Order, even if the system prohibited Mr Melancon from filing his Opposition on February 23, Mr Melancon should have telephoned opposing counsel,[7] and faxed a copy of his Opposition to opposing counsel and the Court with a letter explaining the problem Furthermore, Mr Melancon does not explain why Blanchette's affidavit is dated Monday, February 25 if he had tried to file all ofthese documents on Saturday, February 23. Instead, Mr. Melancon waited two days to take any remedial action, including contacting the Court or opposing counsel.

BPSB raises several arguments in its Reply Memorandum. First, BPSB argues that this Court ruled on February 28, 2008 without allowing BPSB to present any argument. This is incorrect. The February 28 Memorandum Order was in response to BPSB's

Motion for Leave to File Response Memorandum in Excess of Page Limitations, [doc 115], and, as discussed above, this Court exercised its discretion to decline consideration of an untimely filed brief BPSB also argues that Honeywell has a long history of making unsupportable allegations, misrepresenting facts, and multiplying court proceedings, and proffers almost two pages of examples. These discovery disputes were either already resolved by former Magistrate Judge Wilson, or are pending before Magistrate Judge Kay in BPSB's Motion for Sanctions, and are thus not appropriate for this Court to consider.

BPSB also argues that Honeywell failed to show how it was prejudiced by a 39-page memorandum or by an alternative 25-page memorandum. Honeywell need not demonstrate prejudice for this Court to decline consideration of an untimely filed brief; the Notice of Motion Setting states, "[r]esponses not timely filed may not be considered by the Court."[8] BPSB also argues that Honeywell makes numerous, unsupported allegations, such as "if the Court had not rejected BPSB's untimely, overlength filing, Honeywell would have moved to strike because the contents are improper." This argument is irrelevant because BPSB's Opposition was not timely filed and thus this Court was well within its discretion not to consider BPSB's brief.

Lastly, BPSB argues that this Court is somehow invoking its inherent authority to sanction BPSB and strike its Daubert Opposition, which is impermissible given a district court's limited ability to sanction Refusing to consider a brief that does not comport with this Court's deadlines is not a sanction. The efficiency of our legal system depends on compliance with rules and

deadlines. When parties depart from deadlines, they must file leave of court, and such departures are governed by the judge's discretion FED. R CIV. P. 6(b). Moreover, the Notice of Motion Setting for the Daubert Motion states, "[r]esponses not timely filed may not be considered by the Court"[9] Exercising the discretion to not consider an untimely filed response is simply not a sanction.[10] Had BPSB complied with the rules and deadlines governing the submission of its response, this Court would have gladly considered its Opposition.

This Court would have been inclined to consider an Opposition that was untimely filed on the CM/ECF system had BPSB made good faith efforts to comply with the spirit of the deadline by promptly contacting opposing counsel and the Court on Saturday, and submitting copies of his Opposition via facsimile by the 5 p m deadline As it is, there was no contact with the Court or opposing counsel until Monday, February 25, one of BPSB's affidavits was not signed until February 25, and the proposed Opposition with the Motion for Leave to File Page Extension was not attached to BPSB's February 24 filing; accordingly,

IT IS ORDERED that the Motion for Reconsideration, [doc. 121], filed by BPSB, is hereby DENIED

Footnotes

1 See Mem Order (Feb 28, 2008) [doc. 120].
2See docs 112, 113.
3Notice of Motion Setting (Feb. 8, 2008) [doc. 122].
4BPSB filed this suit on July 28, 2005, and this Court has ruled on several motions with deadlines that were

set using the same calendar method as was used for Honeywell's Daubert Motion These motions were set with a Notice of Motion setting, which appears in the docket and specifically refers to "calendar days" as determining the submission date. By now, both parties should be well aware that this Court departs from the Federal and Local Rules in determining submission dates by using a calendar method.

5Notice of Motion Setting (Feb 8, 2008) [doc. 114].

6 Pl.'s Ex. 7 (Feb 24, 2008) [doc. 121]

7Mr Lindemann, Honeywell's counsel, indicates that Mr. Melancon has his cell phone number, and has previously contacted him on that number.

8Notice of Motion Setting (Feb. 8, 2008) [doc 114]; see also FED. R Civ P. 6(b).

9Notice of Motion Setting (Feb 8, 2008) [doc. 114].

10BPSB states that this Court's decision not to consider its untimely filed Opposition demonstrates that the Court's real intent is to dismiss BPSB's lawsuit in stages." BPSB Reply at 9-10 [doc. 129]. This Court's intent is to resolve all pending motions in an expeditious fashion so this case can proceed to the two-week trial scheduled for June 16, 2008.

Filed 2/29/2008

DOCKET NO 2:05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY

MEMORANDUM ORDER

Before the court is a Motion for Leave to File Response Memorandum in Excess of Page Limitations, [doc 115], filed by Beauregard Parish School Board hereinafter "BPSB" , in reponse to Honeywell's Daubert Motion [doc. 112.], Honeywell, Inc. (hereinafter "Honeywell") filed an untimely Opposition [doc.117].

According to Honeywell, on Monday, February 18, 2008, BPSB's counsel, William Melancon, spoke with Honeywell's counsel, Steven Lindemann, about the Daubert Motion briefing schedule. Pursuant to the Court's Notice of Motion Setting, BPSB's Opposition was due by Friday, February 22, 2008. At this time, Mr Melancon represented to Mr. Lindemann that he might require one additional day.

On Friday, February 22, 2008, Mr. Melancon called Mr Lindeman and stated that he would require an

additional day because his secretary's friend's mother died and she needed to leave work immediately to comfort her friend. Apparently Mr. Melancon would be unable to finish and timely file his Opposition without his secretary's assistance. Honeywell agreed to a one-day extension, pending court approval, for BPSB's Opposition if Honeywell could also receive a one-day extension for its Reply. Both parties then called the Court and spoke with Judge Minaldi's civil law clerk, who, in Judge Minaldi's absence, issued a Minute Entry granting both parties a one-day extension because it was mutual and because it would net delay the upcoming hearing. Accordingly, the court reset BPSB's deadline for filing an Opposition at 5 p.m. on February 23, 2008.

On Saturday, February 23, at 4 23 p.m , Mr. Lindemann sent Mr Melanon an e-mail inquiring as to the status of BPSB's Opposition, and requesting Mr. Melancon e-mail him the Opposition in the event that the court does not send out its normal filing notice on weekends.fn1 Mr. Melancon allegedly did not respond to the e-mail. On Sunday, February 24 at 12 11 a.m., BPSB filed its Motion for additional pages, which did not include the proposed opposition, did not request an extension of the filing deadline, and did not mention the untimeliness of the filing BPSB filed the Opposition on Monday, February 25 at 11 07 a m., and Mr Melancon faxed a letter explaining the situation to Chambers at 4 51 p m

Mr. Melancon's February 25 faxed letter to the Court states that when he attempted to file the response memorandum and request for page extension on Saturday, February 23, the system gave him a great deal of problems, and the Motion for Page Exhibits was

finally accepted around midnight, while the Opposition was never accepted. Mr Melancon states that he was concerned his computer system had contracted a virus, and was reluctant to send anything out before speaking with the Clerk of Court's technical department. Mr. Melancon apparently spoke with Sandy at the Western District of Louisiana help desk on Sunday, who advised him to simply re-file The Opposition was filed on Monday at 11:07 a.m.

Stating that "it takes many more words to defend" against attacks on an expert witness and that the lawsuit involves scientific and technical issues not commonly before federal courts its justification for extra pages, BPSB requests leave to file a thirty-nine (39) page Opposition, which well exceeds the twenty-five (25) page limit.

Honeywell opposes BPSB's request because BPSB missed the original deadline for filing its Opposition, and because there is no proper justification for the lengthy brief. Honeywell states that ordinarily the Court (and Honeywell) may be inclined to overlook the untimeliness of BPSB's filing, however, "that BPSB has repeatedly disregarded the rules, taken unfair advantage ofany reasonable accommodation, and disregarded Court rulings." Honeywell correctly states that throughout this case, BPSB has had six deficiency notices, six corrective filings, four motions for excess length briefs, five continuances of trial dates or pre-trial deadlines, four motions for reconsideration, requests for interlocutory appeals or appeals from decisions of the Magistrate Judge, fourteen hearings or orders regarding BPSB's discovery deficiencies, two separate lawsuits over the same subject matter-one of

which was dismissed-and one pending Fifth Circuit appeal. Honeywell also points out that nearly eight (8) pages of BPSB's brief "contain almost nothing but verbatim text cut and-pasted, without attribution or analysis, from footnotes" of FEDERAL PRACTICE & PROCEDURE Honeywell thus requests that this court reject BPSB's submission as untimely and regard Honeywell's Daubert Motion a unopposed.

This court finds it implausible that the Motion to File in Excess of Page Limitations, which included two attachments, was accepted on Sunday, yet the Opposition was not accepted until Monday morning Nonetheless, despite any technical errors, BPSB did not make any effort to timely submit copies via fax or e-mail to opposing counsel or this court. Even if BPSB was concerned about a possible computer virus, nothing prevented BPSB from complying with the spirit of its deadline by faxing courtesy copies to Mr. Lindemann and this court, especially in light of the impending hearing. Moreover, this court now questions the sincerity of Mr Melancon's request for a one-day extension due to his secretary's friend's mother's death, as Mr. Melancon indicated earlier in the week to Mr. Lindemann that he might need a one-day extension, the affidavit accompanying the Opposition was not executed until Monday, February 25, and Mr Melancon did not file or otherwise make available his Opposition until late Monday morning.

As Honeywell points out, this docket is replete with BPSB's deficiencies, requests for extensions, motions to file excess pages and supplemental memoranda and even the filing of a second duplicative suit. Once again, with its untimely Opposition, BPSB took advantage of a

oneday extension, to which opposing counsel generously agreed and this court granted trusting that the request was made in good faith Accordingly, after considering BPSB's Motion and Honeywell's Opposition, and given that this case is scheduled for a two-week trial starting June 16, 2008,

IT IS ORDERED that BPSB's Request to File a Memorandum in Excess of the Page Limitations is hereby DENIED,

IT IS FURTHER ORDERED that this Court shall exercise its discretion and decline to consider BPSB's untimely Opposition Accordingly, Honeywell's Daubert Motion shall be considered unopposed, the March 20, 2008 hearing is hereby MOOT, and this Court shall rule solely on the Daubert Motion [doc. 112] without any further briefing.

Filed 10/22/2007

DOCKET NO. 2 05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY

MEMORANDUM ORDER

Considering the foregoing Motion for Leave to File a Supplemental and Amending Complaint, which would add facts pertaining to plaintiff's Louisiana Unfair Trade Practices Act claim, in light of this court's Memorandum Ruling of September 24, 2007 that dismissed the plaintiff's LUTPA claim,

IT IS ORDERED that the Plaintiff's Motion for Leave to File a Supplemental and Amending Complaint is hereby DENIED

Filed 9/24/2007

DOCKET NO 2.05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE MAGISTRATE JUDGE KAY.

JUDGMENT

In accordance with the corresponding Memorandum Ruling, for the reason set forth therein, based on the pleadings, affidavits, and certified documents submitted by the parties, and the undisputed facts, the Court finds that there is no genuine issue of material fact and that Honeywell is entitled to partial summary judgment as prayed for in its motion; and accordingly:

IT IS ORDERED that the Defendant's Motion for Partial Summary Judgment filed on behalf ofHoneywell Corporation is hereby GRANTED;

IT IS ORDERED that Plaintiff's LUTPA claim is DISMISSED;

IT TS ORDERED that Plaintiff's detrimental reliance claim is DISMISSED;

IT IS ORDERED that Plaintiff's unjust enrichment claim is DISMISSED;

IT IS ORDERED that Plaintiff's claim that it be awarded new Trane chillers is DISMISSED;

IT IS FURTHER ORDERED that the contract's waiver of incidental, special, consequential, or indirect damages is enforceable insofar as it does not limit damages arising out of Honeywell's bad faith

Filed 9/24/2007

DOCKET NO 2:05 CV 1388

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BEAUREGARD PARISH SCHOOL BOARD
VS.
HONEYWELL INC.

PATRICIA MINALDI, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAY

MEMORANDUM RULING

Before the court is defendant Honeywell, Inc.'s Motion for Partial Summary Judgment The plaintiff, Beauregard Parish School Board, filed a Memorandum in Response to Honeywell's Motion for Partial Summary Judgment on April 9.

FACTS

On April 24, 2006, Beauregard Parish School Board ("BPSB") entered into a contract with Honeywell, Inc. ("Honeywell") whereby Honeywell was to retrofit heating, ventilation, and electrical systems at multiple schools, install new chillers, replace fixtures and light bulbs with energy efficient models, and train BPSB employees in energy reduction and maintenance techniques.[1] The purpose of the contract was to provide operational savings to BPSB in the amount of $107,532 over a ten-year period [2] BPSB paid Honeywell $714,308

for the retrofit, as well as monthly fees which, as of June 2005, amounted to $97,458.[3]

The contract also required Honeywell to perform an annual audit of energy savings and submit a report to BPSB for the ten-year guarantee period.[4] Honeywell admits that it did not perform audits for years two through five.[5] In 2001, Honeywell allegedly prepared a "catch-up" report for those years.[6] In December 2001, after Honeywell delivered the catch-up reports, BPSB allegedly expressed its dissatisfaction with the methodology employed by Honeywell to calculate its energy savings.[7] Specifically, BPSB wanted the energy savings to be calculated using its utility bills.[8] Honeywell alleges that BPSB had not provided Honeywell with its utility bills for three years and had not given Honeywell notice of any changes to its facilities—including the addition of numerous computers, portable buildings, etc.—both of which a utility-based audit would have required.[9]

On January 9, 2002, Honeywell wrote to BPSB and nullified the guarantee."[10] On May 29, 2002, BPSB demanded that Honeywell provide a detailed accounting of Honeywell's calculations to support the audit reports for years one through five.[11] In August 2002, the parties convened a conference call to discuss various matters.[12] On July 11, 2005, BPSB filed suit in the 36th District, Parish of Beauregard.

Honeywell now moves for partial summary judgment on Beauregard's extracontractual claims, which include: a claim arising under the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA), a misrepresentation claim, an unjust enrichment claim, a

detrimental reliance claim, and a claim for newTrane chillers. Honeywell also asks this court to enforce the contract's consequential damage waiver clause

SUMMARY JUDGMENT STANDARD

A court should grant a motion for summary judgment when the file, including the opposing party's affidavits, demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law" FED. R. Civ P 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986) The party moving for summary judgment is initially responsible for demonstrating the reasons justifying the motion for summary judgment by identifying portions of pleadings and discovery that demonstrate the lack of a genuine issue of material fact for trial. Tubacex, Inc v. M/V Risan, 45 F.3d 951, 954 (5th Cir. 1995) The court must deny the moving party's motion for summary judgment if the movant fails to meet this burden. Id.

If the movant satisfies this burden, however, the nonmoving party must "designate specific facts showing that there is a genuine issue for trial." Id. In evaluating motions for summary judgment, the court must view all facts in the light most favorable to the nonmoving party.

Matsushita Elec Indus. Co v Zenith Radio Corp , 475 U S 574, 587 (1975). There is no genuine issue for trial, and thus a grant of summary judgment is warranted, when the record as a whole "could not lead a rational finder of fact to find for the non-moving party . " Id.

ANALYSIS

A Louisiana Unfair Trade Practices & Consumer Protection Law

BPSB alleges a violation of the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA). LA REV. STAT. ANN § 51:1401, et seq. LUTPA proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. This legislation is broadly and subjectively stated and does not specify particular violations. Rather, what constitutes an unfair trade practice is determined by the courts on a case-by-case basis." Levine v. First Nat Bank of Commerce, 948 So.2d 1051, 1065 (La. 2006)(citing Farrell v. Carter, 577 So 2d 120, 123 (La. App. 1 Cir. 1991)). "[I]t has been stated that a practice is unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious to consumers and consumers include business competitors." Roustabouts, Inc. v Hamer, 447 So 2d 543, 548 (La App. 1 Cir 1984).

BPSB does not have a viable claim under LUTPA [13] "Where the plaintiffs are not in competition with the defendants, it appears that most courts treat the claim as a breach of contract claim, which is not actionable under LUTPA." Landreneau v Fleet Financial Group, 197 F Supp 2d 551, 557 (M D.La. 2002). The Fifth Circuit has repeatedly recognized that "the statute does not provide an alternate remedy for simple breaches of contract... There is a great deal of daylight between a breach of contract claim and the egregious behavior the statute proscribes." Turner v. Purina Mills, Inc., 989 F.2d 1419, 1422 (5th Cir 1993) (citation omitted). Because the dispute between BPSB and

Honeywell is a breach of contract claim, BPSB's LUTPA claim is not actionable

B. Detrimental Reliance

Honeywell argues that BPSB's detrimental reliance claim must fail because (1) BPSB cannot identify an extra-contractual representation, and (2) any reliance upon extra-contractual representations is unreasonable as a matter of law in view of the written, executed contract between the parties. BPSB does not offer any legal arguments on this issue, but suggests that dismissal of this claim is premature because the jury should be free to find for BPSB on any of several alternate theories.

The theory of detrimental reliance provides: "A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying" LA. Civ. CODE ANN. art. 1967.

"The doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence." In re Ark-La-Tex Timber Co., Inc , 482 F 3d 319 (5th Cir. 2007) (citing May v. Harris Management Corp , 2004-2657 (La. App I Cir 12/22/05); 928 So 2d 140, 145). "The doctrine usually functions when no written contract or an unenforceable contract exists between the parties." Drs Bethea, Moustoukas and Weaver LLC v. St Paul Guardian Ins. Co., 376 F 3d 399, 403 (5th Cir. 2004)(citing Jackson v. Lare, 34-124 (La. App 2 Cir. 11/1/2000); 779 So.2d 808,

814 n.l).

To recover under article 1967, a party must prove (1) a representation by conduct or word, (2) made in such a manner that the promisor should have expected the promisee to rely upon it; (3) justifiable reliance by the promisee; and, (4) a change in position to the promisee's detriment because of the reliance. In re Ark-La-Tex Timber Co., Inc , 482 F 3d at 334 (citing Suire v. Lafayette City-Parish Consol Government, 907 So.2d 37, 59 (La. 2005)). The Fifth Circuit recently stated that "[i]t is difficult to recover under the theory of detrimental reliance, because such a claim is not favored in Louisiana." Id.

Moreover, "Louisiana law recognizes certain situations where a plaintiff's reliance on a promise is unreasonable as a matter of law." Bethea, 376 F 3d at 403. An example of such a situation is where a party relies upon promises made outside of an unambiguous, fully-integrated agreement Id at 403-04 "Many courts have found a plaintiffs reliance to be unreasonable as a matter of law when the parties have a valid contract defining their rights and limiting the ways in which the contract may be modified." Id. at 404. Here, because there exists a fully integrated contract between BPSB and Honeywell, and because BPSB has failed to identify an extra-contractual "representation by conduct or word," BPSB's detrimental reliance claim is dismissed

C Unjust Enrichment

Honeywell argues that in order to maintain an unjust enrichment claim, the plaintiff must have no other available remedy at law. Honeywell avers that because

BPSB has asserted a claim for breach of contract, it has another available remedy

The doctrine of unjust enrichment is codified by Louisiana Civil Code article 2298, which provides:

> A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.

LA. Civ. CODE ANN. art. 2298 A party seeking to recover pursuant to the theory of unjust enrichment bears the burden of proving five elements: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the resulting impoverishment; (4) an absence of 'justification" or "cause" for the enrichment and impoverishment, and, (5) no other remedy at law available to plaintiff Moroux v. Toce, 2006-831 (La. App 3 Cir 11/2/06), 943 So.2d 1263, Baker v Maclay Properties Co., 2006-1000 (La. App. 1 Cir. 5/4/07), 2007 WL 1300820, * 1; see also LA. Civ CODE Arm~ art. 2298 A plaintiff has the burden of proving each element of unjust enrichment by a preponderance of the evidence. Tandy v. Pecan Shoppe of Minden, Inc., 34-578 (La. App. 2 Cir 4/1/01); 785 So.2d 111, 117.

Here, BPSB's claims for breach of contract survive summary judgment. BPSB and Honeywell have a valid,

binding contract, and BPSB has a remedy available at law via its breach of contract claims, Accordingly, BPSB's unjust enrichment claim is dismissed.

D Negligent Misrepresentation

Honeywell argues that a negligent misrepresentation claim[14] is delictual and therefore subject to a one-year prescriptive period. Honeywell avers that BPSB's negligent misrepresentation claim "accrued no later than January 9, 2002, when Honeywell nullified the guarantee." BPSB filed suit on July 11, 2005; thus, Honeywell asserts that any claim for negligent misrepresentation has prescribed.

"A person commits the tort of negligent misrepresentation when (1) he has a legal duty to supply correct information; (2) he breaches that duty; and, (3) his breach causes damages to the plaintiff Society of Roman Catholic Church of Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co , 126 F.3d 727, 742 (5th Cir. 1997) (citing Barrie v. VP. Exterminators, Inc., 625 So 2d 1007 (La.1993); LA. Civ. CODE ANN. arts. 2315 & 2216). "This tort applies in both nondisclosure and misinformation cases." Society, 126 F.3d at 742 (citing Nesbitt v. Dunn, 28240 (La. App. 2 Cir 4/3/96), 672 So.2d 226, 231).

"The action for negligent misrepresentation arises ex delicto.. and is subject to the one year prescriptive period of Civil Code article 3492...." National Council on Compensation Ins v Quixx Temporary Services, Inc., 95-0725 (La App. 4Cir 11/16/95), 665 So.2d 120, 122 (internal citations omitted) The one year prescription period for delictual actions commences from the date

the injury or damage is sustained. Wimberly v Gatch, 635 So.2d 206, 211 (La. 1994) (citations omitted). This prescription statute is strictly construed against prescription and in favor of the obligation sought to be extinguished by it. Id.

The doctrine of contra non valentem is an exception to the prescription rules, and it suspends prescription when the case satisfies one of four scenarios 1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiffs action, 2.) where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting; 3.) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action, and, 4.) where some cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. Id. The plaintiff bears the burden of showing why the claim has not prescribed. Id. BPSB has not demonstrated that contra non valentem applies in its case such that the one-year period is suspended.

Prescription may also be suspended where the tort is continuing A continuing tort arises when "acts or conduct are continuous on an almost daily basis, by the same actor, of the same nature, and the conduct becomes tortious and actionable because of its continuous, cumulative, synergistic nature." Bustamento v. Tucker, 607 So.2d 532, 542 (La. 1992). In the case of a continuing tort, prescription does not commence until the last act occurs or the conduct is abated Id. As to whether a tort is continuous, the Louisiana Supreme Court held.

> A continuing tort is occasioned by [the continual] unlawful acts, not the continuation of the ill effects of an original, wrongful act." . Addressing the requirement that there be continuous conduct by the defendant, we stated that "[t]he continuous conduct contemplated in a continuing tort must be tortious and must be the operating cause of the injury. .When a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort

In re Moses, 788 So.2d 1173, 1183 (La. 2001) (quoting Crump v. Sabine River Authority, 737 So.2d 720 (La. 1999) (other internal citations omitted)). Honeywell's alleged unlawful acts were not continuous. Rather, the only facts that BPSB alleges are the continuation of the ill effects of an original, wrongful act Therefore, BPSB's negligent misrepresentation claim is barred by the one-year statute of limitations

E Claim for New Trane Chillers

Honeywell argues that the court should dismiss BPSB's claim for new Trane chillers because BPSB knowingly accepted McQuay chillers. BPSB claims that its employees and individual board members did not have authority to receive the substituted McQuay chillers.

BPSB also claims that Honeywell knew that school employees or individual board members lacked the authority to modify public contracts.

Professor Litvinoff, in his Obligations treatise, writes.

> [W]hen the obligor is bound to deliver a specified and individualized thing, his performance will not extinguish the obligation unless he delivers that thing....Nevertheless, the obligor may give a different thing if the obligee consents to receive it in performance of the obligation. This is the case of a the giving in payment, which is actually an agreement between obligor and obligee to extinguish the obligation through the rendering of a performance different from that originally contemplated.

5 LA. Civ. L. TREATISE § 13.12 (2006-07) (citing LA. Civ. CODE ANN. arts 2655 & 2659) [15]

BPSB does not present evidence that its employee or board member protested the installation, or that BPSB itself protested the installation of the substitute McQuay chillers. Thus, because BPSB knowingly accepted the McQuay chillers, BPSB's claim for new Trane chillers is dismissed

F. Enforcement of Waiver of Consequential Damages

Honeywell asks the court to uphold the contract's consequential damage[16] waiver clause. This clause excludes "incidental, special, consequential, or indirect" damages. Honeywell asserts that its sole liability for a failure of energy or operational savings is limited to the contractual guarantee of $107,532,00."[17] Therefore, Honeywell suggests that it was "bound to pay BPSB the difference between the annual amount guaranteed and the actual savings achieved," BPSB argues that

Honeywell was in bad faith and the court should not enforce a limitation of liability clause where the breaching party is in bad faith.

A party may limit the amount of damages, but the waiver must be: "1) written in clear and unambiguous terms; 2) contained in the contract, 3) brought to the attention of the parties against whom it is to be enforced." Gulf Am. Indus. v. Airco Indus. Gases, 573 So 2d 481, 489 (La. App. 5 Cir 1990). First, the waiver in this case is clear and unambiguous. The waiver states

> THIS GUARANTEE IS HONEYWELL'S SOLE LIABILITY WITH RESPECT TO ANY CLAIM FOR ENERGY AND OPERATIONAL SAVINGS. IN NO EVENT SHALL HONEYWELL BE LIABLE FOR INCIDENTAL, SPECIAL, CONSEQUENTIAL, OR INDIRECT DAMAGES ARISING FROM OR RELATING TO PERFORMANCE DELIVERY OF ANY PRODUCT OR SERVICE PURSUANT TO THIS AGREEMENT, ANY RELATED SERVICE AGREEMENT, OR THIS GUARANTEE

The contract clearly limits BPSB's damages to the difference between annual projected energy savings and operational savings amount, and the waver reiterates that the energy savings constitute Honeywell's sale liability to BPSB Second, the waiver is contained in the contract; Third, BPSB does not argue that Honeywell failed to bring the waiver to its attention, and Honeywell demonstrates through an affidavit of a board member that the Board was aware

of the waiver "

Waivers of damages caused by bad faith or intentional conduct are void, Article 2004 of the Louisiana Civil Code provides, in pertinent part, "Any clause is null that, in advance, excludes or Louisiana Civil Code provides, in pertinent part, "Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party." LA. Civ. CODE ANN. art 2004. The comment to article 2004 notes that "such clauses are against public policy because the overriding principle of good faith would be destroyed if it were possible to contract away liability for fraud." Id. at cmt. (a). Thus, to the extent that the contractual waiver of consequential damages excludes damages arising out of bad faith or intentional misconduct, the waiver must be void The waiver is, however, otherwise enforceable because it is clear and unambiguous, contained in the contract, and was brought to the attention of BPSB.

For the reasons stated in this Memorandum Ruling,

IT IS ORDERED that the Defendant's Motion for Partial Summary Judgment filed on behalf of Honeywell Corporation is hereby GRANTED;

IT IS ORDERED that Plaintiffs LUTPA claim is DISMISSED;

IT IS ORDERED that Plaintiffs detrimental reliance claim is DISMISSED;

IT IS ORDERED that Plaintiff's unjust enrichment claim is DISMISSED,

IT IS ORDERED that Plaintiff's claim that it be awarded new Trane chillers is DISMISSED,

IT IS FURTHER ORDERED that the contract's waiver of incidental, special, consequential, or indirect damages is enforceable insofar as it does not limit damages arising out of Honeywell's bad faith.

Footnotes

1Pet. ¶ 5; Def.'s Ex. 6 (BPSB-Honeywell Contract).
2Pet ¶ 6 ; Def's Ex. 6, at 18
3Pet ¶ 10; Def's Ex. 6, at 3-4.
4Def's Ex 6, at 18
5Def.'s Statement of Undisputed Facts ¶ 16.
6Id
7Id. ¶18.
8Id.
9ID
10Id. ¶ 19; Pet. ¶ 11.
11Def's Statement of Undisputed Facts ¶ 20
12Id. ¶ 20.
13The issue of whether the plaintiff states a claim under LUTPA is raised here sua sponte
14"A person commits the tort of negligent misrepresentation when (I) he has a legal duty to supply correct information; (2) he breaches that duty, and (3) his breach causes damages to the plaintiff Society of Roman Catholic Church of Diocese of Lafayette, Inc v. Interstate Fire & Cas. Co., 126 F 3d 727, 742 (5th Cir. 1997) (citing Barrie v. VP. Exterminators, Inc , 625 So.2d 1007 (La 1993). "This tort applies in both nondisclosure and misinformation cases." Society, 126 F.3d at 742 (citing Nesbitt v Dunn, 28240 (La App 2d Cir 4/3/96), 672 So.2d 226, 231).

15Article 2655 states, "Giving in payment is a contract whereby an obligor gives a thing to the obligee, who accepts it in payment of a debt." Article 2659 explains, "The giving in payment is governed by the rules of the contract of sale, with the differences provided for in this Chapter."

16Consequential damages are "Losses that do not flow directly and immediately from an injurious act but that result indirectly from the act" BLACK'S LAW DICTIONARY (8th ed. 2004).

17Supp. Mem. 14.

18 In fact, Board member Steve Lacy himself reviewed and marked up the drafts of the contract that contained the waiver provision, Def's Mot. for Partial Summary Judgment 15.

Filed 7/20/2009
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30641
SCHOOL BOARD OF BEAUREGARD PARISH,
Plaintiff-Appellant,
versus
HONEYWELL INTERNATIONAL, INC.,
Defendant-Appellee.

No. 08-31004
SCHOOL BOARD OF BEAUREGARD PARISH,
Plaintiff-Appellant,
versus
HONEYWELL, INC ,
Defendant-Appellee.

Appeals from the United States District Court for the Western District of Louisiana No 2.05-CV-1388.

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges

PER CURIAM:*

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App P and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.